

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

ORIGINAL

74-2303

B
PAS

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANTHONY TORRES,

Defendant-Appellant.

*On Appeal From The United States District Court
For The Southern District of New York*

Appellant's Appendix

ALBERT J. KRIEGER
Attorney for Appellant Torres
401 Broadway
New York, N.Y. 10013
(212) 925-5937



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ANNIVELLA

JUDGE ~~POLLACK~~

JUDGE CANNELLA

74 CRIM. 472

D. C. Form No. 100

CRIMINAL DOCKET

UNITED STATES OF AMERICA

ATTORNEYS

For U. S.:

Bancroft Littlefield, AUS

264-6344

For Defendant:

(4) A. Krieger, 401 B'way,

(3) A. Krieger, 401 B'way,

Defendants.

CASH RECEIVED AND DISBURSED

ABSTRACT OF COSTS

AMOUNT

DATE

NAME

RECEIVED

DISBUR

Fine,

Clerk,

Marshal,

Attorney,

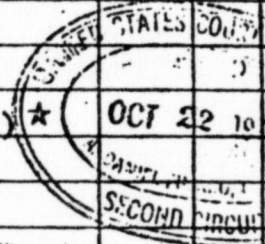
~~XXXXXXXXXXXX~~ 21

~~XXXXXXXX~~ 173,4.846 Consp. to viol. Fed. Narcotic Laws. (Ct. 1) ★

21:812,841(a)(1)(b) Distr. & possess. w/intent to

distr. (Cocaine, II. (Cts. 2-7)

(Seven Counts)



DATE

PROCEEDINGS

5-8-74 Filed indictment and ordered sealed. B/W ordered. B/W issued.

Bauman, J.

5-23-74 Court on application of U.S. Atty. orders indictment unsealed. Matter related to 71Cr1159 and assigned to Pollack, J.

Nelson Garcia (Produced on a writ. Court directs entry of not guilty pl (Deft's counsel Stuart Shaw, Esq. to be contacted by Mr. Littlefield, AU Anthony Torres (atty. present) Pleads not guilty. Bail set by Magistrat \$200,000. continued. Deft. remanded in lieu of bail.

Roberto Rivera (atty. present) Pleads not guilty. Bail set by Mag. conti (\$100,000.) Deft. remanded in lieu of bail. Gurfein, J.

JUDGE CANNELLA

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
5/24/74	Filed deft M. Cerbone's affdvt re: substitution of atty.		
5/28/74	Referred to Pollack, J. as to deft. R. Madonna for pleading.	Cannella, J.	
5/24/74	Filed affdvt of Govt. for writ of habeas corpus ad pros. for deft. Writ. ret. 5/28/74.		
5/29/74	R. Rivera-filed notice of appearance of atty. Albert J. Krieger.		
5/29/74	A. Torres-filed notice of appearance of atty. Albert J. Krieger.		
5/29/74	Deft. Torres (atty present) application of deft. for reduction of bail is adjourned sine die.		
	Deft. Rivera (atty present) application of deft. for reduction of bail to \$50,000. is Granted as of 12 noon, 6/3/74. Govt. given until 4 P.M. on 5/31/74 to submit an affdvt in opposition to the reduction in bail. Pollack, J.		
6/3/74	Filed Govt's affdvt in opposition to the motion of deft R. Rivera for reduction of bail.		
6/3/74	Filed MEMO-END. on Govt's opposing affdvt dtd this date. Bail for Roberta Rivera tentatively to be reduced as of noon 6/3/74 is hereby reinstated at \$100,000. the reduction being hereby revoked and recrued. Pollack, J.		
6/7/74	Deft. Lopez (no atty present) Court directs entry of plea of not guilty. Deft. given until 6/14/74 at 12 noon to obtain counsel.		
	Deft. Torres (no atty present) deft given until 6/14/74 at 12 noon to obtain counsel.		
	Deft. Madonna (no atty present) court directs entry of plea of not guilty.		
	Defts. Lopez, Torres & Madonna' given 10 days for motions. Case set for trial on 7/22/74 at 10 A.M. Pollack, J.		
6/13/74	Filed ORDER TO SHOW CAUSE- re: removal of judge assigned to case etc. ret: 6/17/74 room 128. Pollack, J.		

DATE	PROCEEDINGS
6/18/74	Filed defts' notice of motion re: discovery and inspection, etc.
6/14/74	Filed Govt's notice of readiness for trial.
6/13/74	Filed MEMO-END. on order to show cause dtd 6/13/74. The motion which in effect but in inappropriate languages seeks to have this Court recuse itself herein is totally lacking in merit and is in all respects denied. The application that deft. Garica Be retained at West Street in New York City in the first instance should be handled through the U.S. Atty and referred to the Court only if a suitable accommodation in relation to the needs of this case cannot be arrived at. Pollack, J. mn
6/25/74	Filed memo-end. on motion dtd 6/18/74. Disposed of as indicated on the stenographic record made in open court on this date. Pollack, J. mn
6/14/74	N. Garcia- filed CJA 20 appointment of Stuart R. Shaw, 233 B'way, NYC Suite 3303 10007 233-8991 Pollack, J. mailed copies
5/8/74	M. Garcia)- bench warrants issued. J. Franco)
6/27/74	Filed ORDER that motion for discovery and inspection of defts is granted to the extent indicated, bill of particulars granted to the extent indicated, etc. Pollack, J. mn
7/1/74	Robert Rivera- filed notice of appearance by atty.
7/1/74	Anthony Torres- filed notice of appearance by atty.
6/26/74	Filed letter from S. Shaw to Clerk of the Court re: CJA voucher.
6/26/74	Filed deft N. Garcia's notice of appeal from order to show cause dtd 6/18/74. mailed copies to S. Shaw, AUSA, & deft.
6-28-74	Filed Notice of Reassignment from Pollock J. to Cannella, J.
7/1/74	Filed Govt.'s bill of particulars.
7-18-74	Defts Lopez, Torre, Rivera & Nelson-Garcia- defts did not appear, (attys p Conference held & concluded Deft. Torres application for reduction of bail denied Trial on or after 7-25-74 at 10: AM R. 1105, Cannella, J.
7-18-74	Filed memo endorsed on motion filed 7-18-74. Motion granted as to the request severance of the trial of this deft. (Nelson Garcia), with consent of the govt. See Minutes this date, Motion is otherwise denied without prejudice to renew So ordered, Cannella, J.
7-18-74	E. LOPEZ, -: Filed Order that Dr. William M Hitzig 787 Park Avenue, New York said deft. on or before July 23, 1974 and determine whether the said deft. is physically able to stand trial and report his findings to the Court as soon as possible, etc. as indicated, Cannella, J. MN
7-24-74	E. LOPEZ.-Filed Affidavit of Bancroft Littlefield, Jr. Asst. U.S. Atty for a "abea s Corpus. issued to Warden, Bergen County Jail -Annex Ret. 7-22-74.

DATE	PROCEEDINGS
Aug 1-74	Deft. TORRES & RIVERA, Filed White Envelope Govt Exhibit) 3516 A. D Ordered sealed Cannella, J. and placed in vault, Clerk's Office, Cashier's Dept. Room 602.
Aug. 2-74	A. TORRES) Filed 1 envelope Govt's Ex 3543A id, ordered sealed by Judge Cannella,... R. RIVERA) And Placed in vault Room 602...
4UG 2-74	E. Lopez - Filed transcript of record of proceedings, dated JUNE 24, 1974
7-29-74	ANTHONY TORRES) JURY TRIAL BEGUN - Cannella, JJ. ROBERTO RIVERA)
7-30-74	Trial cont'd
7-31-74	Trial cont'd
8-1-74	Trial cont'd
8-2-74	Trial cont'd
8-5-74	Trial cont'd
8-6-74	Trial cont'd
8-7-74	Trial cont'd
8-8-74	Trial cont'd
8-9-74	Trial cont'd All sides rest
8-12-74	Trial cont'd and concluded...Jury verdict TORRES - GUILTY on cts. 1, 2, 3 RIVERA GUILTY on cts 1 & 4 Sentence Oct. 1-74 Bail conditions cont'd. Both defts Remanded.....Cannella, J.
8-13-74	Filed transcript of record of proceedings, dated JUNE 7, 1974
8-8-74	A. TORRES & R. RIVERA - Filed CJA authorization of So. Dist. Court Reporters...Cannella
8-22-74	Filed Govt's contentions as to the evidence.
8-22-74	Filed Govt's memorandum on sufficiency of evidence
8-22-74	A. TORRES - Filed requests to charge
8-22-74	Filed Govt's requests to charge
8-6-74	Nelson Garcia Filed notice that record on appeal has been certified & transmitted to the USCA on this 6th Day of August, 1974.
8-29-74	WLADIMIR BANDERA - Case ordered transferred to Eastern District of New York for plea and sentence Pursuant to Rule 20..
8/30/74	Filed transcript of record of proceedings, dated Aug 6, 7, 8, 9, 12, 1974
8/30/74	Filed transcript of record of proceedings, dated July 29, 30, 31, Aug 1, 2, 5, 1974
9-30-74	ANTHONY TORRES - Filed information - charging prior narcotic offense

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA :

-v- :

ENRIQUE LOPEZ, a/k/a El Gallego, :
JUAN CARLOS FRANCO, a/k/a Miguel Aspilche, * (Kriegel) :
ANTHONY TORRES, a/k/a Tony T, : INDICTMENT
ROBERTO RIVERA, :
WLADIMIR BANDERA, : S 74 Cr. 472
YOLANDA SARMIENTO, a/k/a Chola : (MP)
EMILIO DIAZ-GONZALEZ, :
NELSON GARCIA, a/k/a Cabilla, :
RALPH MADONNA, :
MIGUEL GARCIA, :
OLIVARES, a/k/a El Pilado Gil, :
ATILIO BOCA, :
COCO SALGADO, :
ALBERTO NAVARRO-DIAZ, :

Defendants. :

-----x
COUNT ONE

The Grand Jury charges:

1. From on or about the 1st day of July, 1970, and continuously thereafter up to and including the date of the filing of this Indictment, in the Southern District of New York and elsewhere, ENRIQUE LOPEZ, a/k/a El Gallego, JUAN CARLOS FRANCO, a/k/a Miguel Aspilche, ANTHONY TORRES, a/k/a Tony T, ROBERTO RIVERA, WLADIMIR BANDERA, YOLANDA SARMIENTO, a/k/a Chola, EMILIO DIAZ-GONZALEZ, NELSON GARCIA, a/k/a Cabilla, RALPH MADONNA, MIGUEL GARCIA, OLIVARES, a/k/a El Pilado Gil, ATILIO BOCA, COCO SALGADO, ALBERTO NAVARRO-DIAZ, the defendants, and Alfredo Mazza, Lorenzo Cancio, Alfredo Aviles, Jorge Varela-Fernandez, Roberto Cristobal, Elsa Yasbic, a/k/a LaTurca, and Rodolfo Ruiz, a/k/a The Painter, named as co-conspirators, and others to the Grand Jury known and unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 173, 174, 812, 841(a)(1), 841(b)(1)(A), 952(a), 960(a)(1) and 960 (b)(1) of Title 21, United States Code.

2. It was part of said conspiracy that before May 1, 1971, the said defendants, unlawfully, wilfully, knowingly, and fraudulently would import and bring into the United States large amounts of heroin and cocaine, narcotic drugs, from places outside thereof, to wit, Chile and Argentina, and elsewhere to the Grand Jury known and unknown, in violation of Sections 173 and 174 of Title 21, United States Code.

3. It was further part of said conspiracy that before May 1, 1971, the said defendants unlawfully, wilfully, and knowingly would receive, conceal, buy, sell, and facilitate the transportation, concealment and sale of a large quantity of heroin and cocaine, narcotic drugs, the exact amount and nature thereof being to the Grand Jury unknown, after the said narcotic drugs had been imported and brought into the United States contrary to law, knowing that the said narcotic drugs had been imported and brought into the United States contrary to law in violation of Sections 173 and 174 of Title 21, United States Code.

4. It was further part of said conspiracy that on and after May 1, 1971, the said defendants and co-conspirators unlawfully, intentionally and knowingly would import into the United States from places outside of the United States, to wit, Chile and Argentina, and elsewhere to the Grand Jury known and unknown, large quantities of heroin and cocaine, Schedules I and II narcotic drug controlled substances, the exact amount thereof being unknown, in violation of Sections 812, 952(a), 960(a)(1) and 960(b)(1) of Title 21, United States Code.

5. It was further part of said conspiracy that on and after May 1, 1971, the said defendants and co-conspirators unlawfully, intentionally and knowingly would distribute and possess with intent to distribute large quantities of heroin and cocaine, Schedule I and II narcotic drug controlled

substances, the exact amount thereof being to the Grand Jury unknown, in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

6. Among the means by which the defendants carried out this conspiracy were the following:

(a) YOLANDA SARMIENTO, a/k/a Chola, WLADIMIR BANDERA, JUAN CARLOS FRANCO, a/k/a Miguel Aspilche, Alfredo Mazza and Rodolfo Ruiz, a/k/a The Painter, obtained approximately 1/6th of a ton of heroin and cocaine in Argentina and Chile which they smuggled in seven separate air freight shipments into the United States secreted in antique picture frames.

(b) ENRIQUE LOPEZ, a/k/a El Gallego, assisted in arranging for buyers for the heroin and cocaine in New York City and demanded in return a commission of approximately five hundred dollars per kilogram.

(c) ANTHONY TORRES, a/k/a Tony T, ROBERTO RIVERA, and Lorenzo Cancio and others purchased the heroin and cocaine in New York City for more than one million dollars.

(d) NELSON GARCIA, a/k/a Cabilla, RALPH MADONNA and MIGUEL GARCIA purchased the heroin and cocaine on its resale in New York City.

OVERT ACTS

--In pursuance of this conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York and elsewhere:

(1) In or about October and December, 1970, defendant JUAN CARLOS FRANCO, a/k/a Miguel Aspilche, and co-conspirators Alfredo Mazza and Rodolfo Ruiz, a/k/a The Painter, air freighted fourteen kilograms of heroin, which they had received from defendant YOLANDA SARMIENTO, a/k/a Chola, from Buenos Aires, Argentina, to New York, New York, secreted in antique picture frames.

Informant
interviewed for
up -
obtained
17 - summary

(2) In or about January, 1971, defendant JUAN CARLOS FRANCO, a/k/a Miguel Aspilche, and co-conspirator Rodolfo Ruiz, a/k/a The Painter, air freighted approximately twenty kilograms of narcotic drugs secreted in antique picture frames from Buenos Aires, Argentina, to New York, New York.

(3) In or about January, 1971, defendant ANTHONY TORRES, a/k/a Tony T, purchased approximately twenty kilograms of narcotic drugs in New York, New York.

(4) In or about January, 1971, defendant ENRIQUE LOPEZ, a/k/a El Gallego, introduced defendant JUAN CARLOS FRANCO, a/k/a Miguel Aspilche, to co-conspirator Lorenzo Cancio in New York, New York.

(5) In or about April, 1971, co-conspirator Alfredo Mazza air freighted ten kilograms of heroin and three kilograms of cocaine which cocaine he had obtained from defendant YOLANDA SARMIENTO, a/k/a Chola, from Buenos Aires, Argentina, to New York, New York, secreted in antique picture frames and sold it to co-conspirator Alfredo Aviles.

(6) In or about April, 1971, defendant ANTHONY TORRES, a/k/a Tony T, negotiated with co-conspirator Alfredo Mazza for the purchase of ten kilograms of heroin in New York, New York.

(7) In or about May, 1971, defendants JUAN CARLOS FRANCO, a/k/a Miguel Aspilche, and WLADIMIR BANDERA, air freighted approximately forty kilograms of cocaine, which BANDERA had bought from defendant OLIVARES, a/k/a El Pilado Gil, in Chile, from Buenos Aires, Argentina, to New York, New York, secreted in antique picture frames.

(8) In or about May, 1971, defendant JUAN CARLOS FRANCO a/k/a Miguel Aspilche, met with defendant ENRIQUE LOPEZ a/k/a El Gallego, in New York, New York, and discussed the sale of approximately forty kilograms of cocaine.

out
OBJECTION
SUSTAINED
AT NEW YORK

(9) In or about May, 1971, defendant ANTHONY TORRES, a/k/a Tony T, purchased a quantity of cocaine from defendant JUAN CARLOS FRANCO, a/k/a Miguel Aspilche, for a price in excess of \$30,000 in New York, New York.

IN FRANCE
(10) In or about May, 1971, defendant ROBERTO RIVIERA purchased a quantity of cocaine from defendant JUAN CARLOS FRANCO, a/k/a Miguel Aspilche, for a price in excess of \$16,000 in New York, New York.

USA directed to find better date and a definite place

(11) In or about May, 1971, defendant JUAN CARLOS FRANCO, a/k/a Miguel Aspilche, sold approximately 1-3/4 kilograms of cocaine to co-conspirator Lorenzo Cancio for approximately \$19,000 in New York, New York.

✓ (12) In or about May, 1971, defendant ROBERTO RIVIERA delivered approximately \$16,000 to co-conspirator Lorenzo Cancio at Eva's Intimate Lounge, 1639 Westchester Avenue, Bronx, New York.

(13) In or about July, 1971, defendants COCO SALGADO and ATILIO BOCA delivered twenty-five kilograms of heroin and defendant ALBERTO NAVARRO-DIAZ delivered five kilograms of cocaine to defendant WLADIMIR BANDERA in Buenos Aires, Argentina.

(14) In or about July, 1971 defendants WLADIMIR BANDERA and JUAN CARLOS FRANCO, a/k/a Miguel Aspilche, air freighted approximately twenty-five kilograms of heroin and five kilograms of cocaine secreted in antique picture frames from Buenos Aires, Argentina to New York, New York.

(15) In or about July, 1971, defendants JUAN CARLOS FRANCO, a/k/a Miguel Aspilche, and WLADIMIR BANDERA met co-conspirator Lorenzo Cancio in Los Angeles, California.

(16) In or about July, 1971, defendant ANTHONY TORRES, a/k/a Tony T, travelled from New York, New York, to Los Angeles, California.

(17) In or about August, 1971, defendant JUAN CARLOS FRANCO, a/k/a Miguel Aspilche, delivered approximately twenty-five kilograms of heroin and five kilograms of cocaine

to co-conspirator Lorenzo Cancio in New York, New York.

(18) In or about August, 1971, defendant NELSON GARCIA, a/k/a Cabilla, purchased approximately seven kilograms of heroin in New York, New York.

(19) In or about August, 1971, defendant RALPH MADONNA purchased approximately eight kilograms of heroin and 1/8th kilogram of cocaine in New York, New York.

(20) In or about August, 1971, defendant MIGUEL GARCIA purchased approximately eight kilograms of heroin and one kilogram of cocaine in New York, New York.

(21) In or about September, 1971, defendant YOLANDA SARMIENTO, a/k/a Chola, and co-conspirator Alfredo Mazza air-freighted approximately eighteen kilograms of heroin and nine kilograms of cocaine secreted in antique picture frames from Buenos Aires, Argentina, to co-conspirator Rodolfo Ruiz, a/k/a The Painter, in New York, New York.

(Title 21, United States Code, Sections 173, 174, 846 and 953.)

COUNT TWO

The Grand Jury further charges:

On or about the 12th day of January, 1971 in the Southern District of New York, ANTHONY TORRES, a/k/a Tony T, ENRIQUE LOPEZ, a/k/a El Gallego, and JUAN CARLOS FRANCO, a/k/a Miguel Aspilche, the defendants, unlawfully, wilfully and knowingly did receive, conceal and facilitate the transportation and concealment of a narcotic drug, to wit, approximately twenty kilograms of narcotic drugs after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the

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Director of the Bureau of Narcotics and Dangerous Drugs may find necessary to provide for medical and legitimate uses only, is prohibited.

(Title 21, United States Code, Sections 173 and 174; Title 18, United States Code, Section 2.)

COUNT THREE

The Grand Jury further charges:

On or about the 19th day of May, 1971, in the Southern District of New York, ANTHONY TORRES, a/k/a Tony T, ENRIQUE LOPEZ, a/k/a El Gallego, and JUAN CARLOS FRANCO, a/k/a Miguel Aspilche, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately ten kilograms of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); and Title 18, United States Code, Section 2.)

COUNT FOUR

The Grand Jury further charges:

Applied to Rivera
On or about the 19th day of May, 1971 in the Southern District of New York, ROBERTO RIVERA, ENRIQUE LOPEZ, a/k/a El Gallego, and JUAN CARLOS FRANCO, a/k/a Miguel Aspilche, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately two or more kilograms of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A) and Title 18, United States Code, Section 2.)

COUNT FIVE X

The Grand Jury further charges:

On or about the 2nd day of August, 1971 in the Southern District of New York, NELSON GARCIA, a/k/a Cabilla, ENRIQUE LOPEZ, a/k/a El Gallego, and JUAN CARLOS FRANCO, a/k/a Miguel Aspilche, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance,

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to wit, approximately seven kilograms of heroin.

(Title 21, United States Code, Sections 812, 841
(a)(1) and 841(b)(1)(A) and Title 18, United
States Code, Section 2.)

COUNT SIX X

The Grand Jury further charges:

On or about the 2nd day of August, 1971 in the
Southern District of New York, RALPH MADONNA, ENRIQUE LOPEZ,
a/k/a El Gallego, and JUAN CARLOS FRANCO, a/k/a Miguel
Aspilche, the defendants, unlawfully, intentionally and
knowingly did distribute and possess with intent to dis-
tribute Schedule I and II narcotic drug controlled substances,
to wit, approximately eight kilograms of heroin and one-
eighth kilogram of cocaine.

(Title 21, United States Code, Sections 812, 841
(a)(1) and 841(b)(1)(A), and Title 18, United
States Code, Section 2.)

COUNT SEVEN X

The Grand Jury further charges:

On or about the 2nd day of August, 1971 in the
Southern District of New York, MIGUEL GARCIA, ENRIQUE
LOPEZ, a/k/a El Gallego, and JUAN CARLOS FRANCO; a/k/a
Miguel Aspilche, the defendants, unlawfully, intentionally
and knowingly did distribute and possess with intent to
distribute Schedule I and II narcotic drug controlled
substances, to wit, approximately eight kilograms of
heroin and one kilogram of cocaine.

(Title 21, United States Code, Sections 812, 841
(a)(1) and 841(b)(1)(A) and Title 18, United
States Code, Section 2.)

Foreman

PAUL J. CURRAN
United States Attorney

CHARGE OF THE COURT

(Cannella, J.)

THE COURT: At the outset, I want to thank the jury for the patience with which they have been listening to this case. And certainly they must have a great deal of patience to hear so much talking all in one day.

I want to thank the lawyers for the assistance they have been to the court because they have from time to time assisted me in various aspects of the law in this case and on your behalf and on my own behalf I thank them, both Mr. Littlefield and Mr. Schwartz and Mr. Brown and the other part of the two-headed lawyer, Mr. Krieger.

I was going to go into a greater discussion of the facts, but since the lawyers have done it in such precise fashion, and since they have indicated the areas involved in their respective defenses, I don't intend to go into the facts in any great detail. I may mention facts from time to time, but the only reason I am doing it is to assist you in understanding how to apply the law to this particular area.

The case, of course, starts with an indictment, and the indictment in this case contains four

2 courts known as a conspiracy count and the other three are
3 substantive counts.

4 The defendants pleaded not guilty to these
5 charges and therefore issues arise here, questions of fact.

6 If they agreed on the facts, there would be
7 no need for a jury. Then the judge would decide both the
8 facts and the law. However, since they disagree, that is
9 why you have been selected and you are the sole and sovereign
10 judges of the facts. You are the only ones that can decide
11 what the facts are regardless of what the court says about
12 them or what the lawyers have said about them. It is
13 your recollection that counts.

14 You are also the sole judges of the credibility
15 of the witnesses. It is you who will make a judgment
16 as to which witnesses you will believe and how much of
17 their testimony you will believe.

18 It is your judgment on the evidence also, as
19 you consider it, how much of it you will accept and how
20 much of it you will disregard.

21 Questions of law, however, you must take
22
23
24
25

1 coa

2 from the court and apply them to the facts as you find
3 them.

4 Now, we start out with the proposition that
5 a defendant in a criminal case is presumed by law to be
6 innocent and that presumption remains with him through-
7 out the trial unless and until he is proven guilty of
8 the crime charged by credible evidence beyond a
9 reasonable doubt.

10 The burden of proving the defendant guilty
11 beyond a reasonable doubt rests upon the government and
12 this burden never shifts throughout the trial.

13 The law does not require the defendant to
14 prove his innocence or to produce any evidence. He
15 may rely upon evidence brought out on cross examination
16 of witnesses for the government. If the government
17 fails to prove a defendant guilty beyond a reasonable
18 doubt, it is your obligation to acquit him.

19 Now, in this particular case there are two
20 defendants that are on trial. If my recollection
21 serves me right, there are 14 defendants altogether in
22 the indictment. You will see the indictment because
23 you will get a copy of it when you go in to deliberate.
24 The only two that we are concerned with at this time
25 are the defendants Torres and Rivera.

2 In discussing their particular case you must
3 discuss them separately from one another. Each de-
4 fendant from the other. The mere fact that they are
5 sitting here on the same side of the table, and sometimes
6 one lawyer helped another lawyer out during the course
7 of the trial does not mean that they have a common
8 interest here. They are as apart as they can be and
9 they must be considered apart and your judgment must be
10 a separate judgment as to each.

11 In addition to that, there are a number of
12 charges and you must consider each charge. The first
13 one charges the both of them; the substantive counts
14 charge them singly. The second count, I believe,
15 charges Torres, the third count charges Torres, and
16 the fourth count charges Rivera. You will consider
17 each of those charges separately and render a separate
18 judgment on each charge.

19 Since the government has the burden of proof
20 it must prove the defendants' guilt by credible evidence
21 by a reasonable doubt before you may convict them.
22 The tool used in order to do this can be described as
23 evidence. Evidence can be described in a number of
24 ways.

25 The first describes it by quality and

2 quantity. By quality we mean credible evidence,
3 evidence that is believable. By quantity we mean
4 beyond a reasonable doubt.

5 That expression "beyond a reasonable doubt"
6 is not a very difficult concept to understand. A
7 reasonable doubt means a doubt that is based on reason
8 and must be a substantial rather than a speculative
9 doubt. It must be sufficient to cause a reasonably
10 prudent person to hesitate to act in more important
11 affairs of his life.

12 Now, evidence may also be described in
13 another fashion, and the subdivisions that I am using
14 in this particular area are as follows:

15 First, testimony. That means a person
16 comes here, takes the stand and describes to you what
17 he knows by the use of his senses. It includes any
18 natural inferences that flow from that testimony and
19 it includes anything that is brought out during the
20 course of that witness' testimony, whether it be on
21 cross examination or direct examination.

22 It also includes the exhibits in the case.
23 Now, it only includes those exhibits which have been
24 marked in evidence. The exhibits which have not been
25 marked in evidence are not evidence in this case and may

2 not be considered by you and you may not speculate as
3 to what is in them. Only the things that have been
4 introduced may be considered by you.

5 The third thing is stipulations. One that
6 comes to mind is the stipulation about the chemist.
7 The parties stipulated that he was a chemist and that
8 he is the exception to the ordinary witness, he can give
9 an opinion based on his expertise and his knowledge in
10 the particular area in which he is; he can tell you,
11 after he makes his various tests, what in his opinion
12 the substances are.

13 In this particular case he described, it
14 was agreed between the parties, stipulated that he made
15 a judgment here, an opinion that the narcotics or the
16 substances, rather, in question, that white powder in
17 question was in one case heroin and in the other case
18 cocaine.

19 In addition to that, the court many times
20 takes judicial notice of various things. They
21 are things which are so easily proven, they are common
22 knowledge, that the law requires no evidence be produced.
23 It simply takes judicial notice of them.

24 One of the things, for example, in this
25 case I take judicial notice of is that these locations

2 that were mentioned in Westchester Avenue, actually, al-
3 though the witness thought it was Westchester, it was
4 really Westchester Avenue in the Bronx, a bar up there,
5 that was in reference some testimony concerning the
6 defendant Rivera, that that is within the Southern
7 District of New York; that the other locations named in
8 Manhattan, El Quixote and so forth, that is also in the
9 Southern District of New York. That gives you the
10 authority to sit in this case because it is within the
11 confines of our district, the Southern District of New
12 York.

13 I also take judicial notice of the fact
14 that heroin is a prohibited substance. It may be that
15 a slight history of what has happened in this area might
16 be of assistance to you.

17 The narcotic problem in the United States
18 has not been a recent one, it goes back as far as the
19 '20s. At that time women apparently took this for a
20 periodic problem they have, to ease their suffering,
21 and they used large quantities of it and it was called
22 laudanum, which was an opium derivative. As a result
23 of it, strange to say, a lot of these ladies were the
24 first drug addicts, so Mr. Harrison, who was a member
25 of Congress, proposed a law which was called the Harrison

2 Narcotic Act. The aim and the object of it was
3 to prevent this condition, so the way it was attacked
4 was to proscribe and prohibit the smuggling of any
5 opium derivative into the United States because opium
6 is not grown in the United States, it must be grown else-
7 where, and therefore any product concerning this must
8 be imported.

9 So Harrison also proposed that there be a
10 tax on this and also that the substance be sold out
11 of the original bottle and so'forth. It was
12 the first attempt to do something about this problem.

13 Now, as time went on the problem didn't
14 ease, but it started to concern other segments of our
15 population, and so you had Mr. Jones enter the picture,
16 another legislator, quite a few years later, and
17 here again he proposed in Congress that the problem be
18 attacked in another fashion. His law also pro-
19 scribed the illegal importation of drugs into the
20 United States -- we call it smuggling, interchangeably
21 used -- but it then said further: it said nobody
22 may receive, conceal, buy, sell or facilitate the
23 transportation of any such substance. So that was
24 the second attack made on the problem, a major attack.

25 Now, that law, the way it was passed,

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2 required a number of things to be proven before a
3 defendant could be convicted. One of them was, for
4 example, that the substance was illegally imported.
5 And, by the way, heroin itself, I take judicial notice
6 that heroin has no legal use in the United States what-
7 soever. There is no way of legally possessing
8 heroin.

9 It is a strange thing about heroin -- here
10 again we go back into the history -- heroin came
11 about this way: There is a substance called the
12 elixir of terpin hydrate with codeine, which you may
13 be familiar with if you get a cold, and this is a good
14 substance for a cold. Now, some German scientist
15 discovered that if you made this with heroin it was about
16 10 times more effective than with codeine, and it was
17 true, but the only trouble was that it was very highly
18 addictive. The good that it did was more than far
19 outshadowed by the bad that it did, so the government
20 here in the United States said no heroin in the United
21 States, and there is no way of getting heroin into the
22 United States and possessing it legally even today.

23 Now, the problem continued on because under
24 the Act it was required that before you could convict
25 a defendant in other areas, for example, involving cocaine

2 or other substances, you had to show that the defend-
3 ant knew that it was illegally imported. That was a
4 requirement and that is a requirement under one section
5 of our case here because on May 1st of 1971 the law
6 was changed and that particular law which required
7 knowledge on the part of the defendant that the sub-
8 stance was illegally imported was changed, and now
9 Congress attacks the problem this way: It says
10 we still forbid the illegal importation of narcotics
11 into this country. We also forbid, in addition to
12 that, distribution or possession with intent to distri-
13 bute certain what they call controlled substances.
14 I take judicial notice that in this case the controlled
15 substances include heroin and cocaine.

16 So I take judicial notice of these facts be-
17 cause they are knowledge which has been in the books and
18 is known and can easily be established.

19 There are other stipulations which were
20 made by the parties and if you remember them you will
21 apply them to the case.

22 The last item that I would discuss with
23 you in this particular area, we are talking about the
24 versions of evidence, are these grand jury minutes and
25 certain reports and certain documents in which statements

2 appear. Now, those statements that appeared in
3 the grand jury minutes, which were read into the record,
4 have been agreed upon by the parties to in fact be part
5 of that record. You will consider it as evidence.
6 That also applies to those reports, parts of which were
7 read into the record.

8 Now, evidence also can be divided in another
9 way. It can be divided into what is called direct
10 evidence and circumstantial evidence. The law does
11 not make any distinction between these two kinds of
12 evidence. It simply requires that when you get all
13 through you are satisfied beyond a reasonable doubt,
14 either by direct or by circumstantial evidence or by a
15 combination of both of the defendant's guilt beyond a
16 reasonable doubt before you may convict him.

17 Now I will define what is meant by direct
18 evidence and what is meant by circumstantial evidence.

19 A defendant may be proven guilty by either
20 direct or circumstantial evidence. Direct evidence
21 is the testimony of one who asserts actual knowledge of
22 the fact, such as an eyewitness. Circumstantial
23 evidence is proof of a chain of facts and circumstances
24 indicating the guilt or the innocence of the defendant.
25 The law makes no distinction between the weight to be

2 given to either direct or circumstantial evidence.
3 It requires only that you, after weighing all the
4 evidence, must be convinced of the guilt of the de-
5 fendant beyond a reasonable doubt before he may be con-
6 victed.

7 Now, in order to evaluate what is important
8 in the case and what is not, there are certain things
9 which are not evidence which I must call your attention
10 to so that you can disregard them. They are not
11 part of the case. They are not evidence in the case.

12 The first I call your attention to is the
13 indictment. The indictment in this case is only
14 evidence that the grand jury made an accusation, period.
15 None of the facts that are recited in the indictment are
16 evidence. The evidence must come here in the courtroom
17 either by way of witnesses or by the other four or
18 five items that I have just recited to you.

19 Now, there were some questions asked, and
20 in asking the question it assumed some facts and there
21 were objections made to that question and I sustained
22 the objection. You may not use as evidence any
23 fact which was contained in a question unless it is proven
24 to your satisfaction in some other way during the course
25 of the trial.

2 If you recall a particular incident when it
3 did happen, I gave you the old saw example of the
4 question asked of a man: When did you stop beating
5 your wife? Now, the mere fact that that statement
6 contains the fact of a man beating his wife doesn't
7 prove that the man ever beat his wife, and so any of
8 these questions which were stricken, the facts in them
9 you will disregard them unless they were proven in some
10 way during the rest of the trial, the testimony that you
11 heard during the rest of the trial.

12 The comments of the lawyers -- and I might
13 say I think there have been a comment or two in this
14 case, both by the court and by the lawyers -- I say
15 to you that comments are not evidence. You are to
16 disregard them. None of the lawyers was sworn in --
17 may be sworn at, but not sworn in -- and certainly the
18 court wasn't sworn in, so we did not testify and we did
19 not testify and we did not take an oath and none of this
20 is admissible and you are to disregard these comments.

21 Now, how do you find out where the truth
22 lies in the case? Well, Anglo-Saxon juries for many
23 years have used certain norms, and I will call some
24 of them to your attention so that you can be assisted
25 in arriving at the truth in this case.

2 The first thing is the demeanor of the wit-
3 ness. How did he appear to you on the stand? Was
4 he hesitant? Did he beg time by asking questions?
5 Did he shift around? In other words, use that same
6 fine common sense that you use in your everyday life in
7 matters of great importance to you. When you go to
8 buy a car and you start kicking the wheels and
9 slamming the door and other things, you also listen to
10 the salesman. How much attention do you pay to him
11 and what do you believe. The same if you went to buy
12 a house. All those important things that you do.
13 Use that same fine common sense that you do when you
14 do those things.

15 Of course, the interest of a witness is of
16 importance. There are so many things to be said
17 about these witnesses. Essentially, however, there
18 is really not that great number of witnesses to really
19 cause you a great deal of trouble because when you
20 get right down to it, you know, the witnesses actually
21 were not that great in numbers.

22 Of course, numbers don't really mean anything;
23 it is the quality of the testimony that means something.
24 But, for example, Redondo. Now, Redondo, I would
25 almost forget about him, that is about as much as I

2 feel about Redondo, because Redondo was allowed for one
3 specific purpose, and for the life of me I am amazed --
4 I haven't counted the pages, but here is a fellow, the
5 only reason I allowed his testimony was to show that
6 since there is mental operation involved here as far as
7 these defendants are concerned that are before you,
8 and some of them that are named in the indictment,
9 as to whether or not they were acting unlawfully,
10 knowingly and wilfully, which is mental operation --
11 this testimony was offered to show that they had previous
12 knowledge of this kind of activity and therefore they
13 couldn't be doing this by inadvertence or mistake or
14 in good faith. That was the only reason. That
15 was the only reason.

16 Actually, all that developed was that some-
17 how or other -- and this wasn't even the purpose of the
18 testimony -- it was brought out on cross examination I
19 think that there was another way of smuggling in
20 demijohns. Well, that has got nothing to do with
21 this case whatsoever, nothing at all to do with it.

22 But here in the case of Redondo I think his
23 testimony is about 400 pages and about 80 pages have got
24 to do with h's background, his record, what a crook he
25 was, how much he was in jail and all these other things.

2 But essentially we have him only for one narrow,
3 limited purpose. So we get down to the next fellow.
4 That was Korniloff, the agent.

5 What did he testify to? He was brought
6 in on the direct examination because somebody showed
7 somebody a picture, as I recall, and he was going to
8 identify that he gave him some pictures to look at.
9 That is what he testified there.

10 Then later on he was called for another pur-
11 pose during the course of the defendants' part of the
12 case and he was examined again. What are we
13 doing here at this point? We are looking into the inter-
14 ests of the people. What interest has Korniloff got
15 in this?

16 Redondo, of course, we know all kinds of
17 things about him. He is convicted, he has got all
18 kinds of bad things that he has done, and, of course,
19 all these things must be considered as to each
20 witness. That is why we are looking into these
21 particular witnesses, to discover what do we have to know
22 about him in order to evaluate him, to say whether he
23 is telling the truth or not.

24 So we look into the interests of Redondo.
25 We find out his terrible record and we know all about

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2 that.

3 The agent, of course, as Mr. Schwartz
4 says, he is employed by the government, but I don't think
5 he himself is quarreling with his testimony, nor
6 with the agent's testimony of Stafford, III.

7 By the way, it is not unusual to have a
8 III. I have a III in my family, John Phelan, III.
9 Gee, I never heard of it, a Sicilian, John Phelan, III.

10 But, in any event, here he is here and he
11 is an agent so he is trying to do his job, right.

12 Then we have Mazza. Now, here we know
13 all about his background and we know all about his
14 deals, we know about the fact that he finally wound up
15 pleading to spitting on the sidewalk, to use a vulgar
16 expression, when he was charged with a very grave crime
17 of drugs. I think they let him plead guilty to false
18 papers or something like that. But, in any event,
19 we know his background, and considering his background
20 you will make a judgment as to his interest and how much
21 it affects his testimony.

22 Hector Santiago is an agent. He is in
23 the same position as Korniloff.

24 Wladimir Banderas -- here is what is called
25 a major crime man, a man that deals in large quantities

2 of drugs and who has a record and everything else, all
3 these backgrounds have been brought out, lying and what-
4 not. All these things you will consider in the
5 light of how much you are going to believe him.

6 Frank Ambio was an agent, and what he did
7 was identify the drugs.

8 Lorenzo Cancio, of course here is another
9 man who got a very, very seedy background and who had
10 been in drugs and who has been convicted and has this
11 promise from the government. You will consider that
12 and whatever interest that has in determining the
13 truth of his testimony.

14 Cosmo Magarelli, well, he is the man that
15 came in and said that the records from the picture frames
16 are here and he identified them. He certainly has
17 no interest in this case whatsoever that I am aware of.

18 Then you have the agent, Ellin, and, of
19 course, Stafford, and Mr. Schwartz says he has no quarrel
20 with it.

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2 Now, then, Mazza was recalled and Korniloff was
3 recalled. So, as to each one of them you consider their
4 interest in weighing it and determining the credibility
5 of the witness.

6 Now, if any witness has falsely testified to
7 a material fact, you must disregard that portion of it
8 which is false. You may disregard the whole testimony.

9 Now, there are a lot of ladies on this jury and
10 I will give you an example of that. If you make an
11 omelet and you don't know how to properly make it, and
12 when this case is over I will tell you if you want to know,
13 and you get a bad egg in there, you are not going to
14 serve that omelet to your husband or whoever is home in
15 the family because it smells bad, it tastes bad and you
16 are just going to throw the whole thing away. That is
17 the material part which you must throw away.

18 On the other hand, if you burn a piece of toast,
19 you can just scrape off the part that is burnt and eat
20 the rest or give it to your husband. In any event, you
21 don't throw it away. That is the way that particular
22 rule works.

23 We have people here that are described in law
24 as accomplices. Now, an accomplice is one who voluntarily
25 participates in the commission or the planning of the crime.

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1 In this particular case we have Mazza, Banderas, Cancio
2 and Redondo. Of course, Redondo is not an accomplice in
3 the sense that he is mixed up in this particular conspiracy
4 that we are trying here today, but his testimony must be
5 looked upon the same way that you look upon an accomplice's
6 testimony.
7

8 An accomplice's testimony must be closely
9 examined and it must be weighed with great care. If you
10 believe the testimony of an accomplice to be true beyond
11 a reasonable doubt, that testimony is sufficient to
12 convict a defendant even though it is not corroborated by
13 any other evidence.

14 Of course, in this case the United States
15 Attorney had a litany about corroboration. He had the
16 pictures, he had other evidence, he had the documents, he
17 had a lot of things, a lot of talk between each other
18 which he believed to corroborate one another. As far as
19 that goes, I don't give much weight to one accomplice
20 corroborating another one. That doesn't lend too much
21 to it, but you can consider all the evidence in the case
22 and all the circumstantial evidence in the case in deter-
23 mining how much of the accomplice's testimony you are going
24 to believe.

25 Now, some of the witnesses have been convicted

of crimes. The testimony of a witness may be discredited or impeached by showing that he has been convicted of a felony. The prior conviction does not render him incompetent to testify. It merely reflects on his credibility. It is your province to determine what weight, if any, should be given to such conviction and impeachment.

Now, there are also some statements which were brought out what would be described in law as prior contradictory statements. In this particular area you will recall that on cross-examination many times prior statements were called to the attention of the witness and it was claimed by one party that that was a prior inconsistent statement. On the other hand, the other lawyer said that it wasn't and I said, look, it's going to be up to jury. They are going to decide on that.

Now, in this particular area the testimony of a witness about a fact may be discredited or impeached by evidence that at another time the witness made a statement inconsistent with or contradictory of the witness' present testimony. If you conclude that there are inconsistencies between the witness' testimony here and an earlier statement made by the witness out of court, then you may reject the testimony given in court on that

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point.

You do not, however, take the out of court statement as establishing the true fact, but you, rather, treat it only as nullifying the testimony already given here in court.

If the prior inconsistent statement was made under oath, then you may take such fact into consideration in assessing the credibility of the witness while testifying under oath in this court.

I will give you only one example of that. I think you will remember some others. Cancio said that, in fact, he did lie. He lied in the grand jury and he lied in the case. As a matter of fact, Judge Pollack called him a "blatant perjurer".

So that you will consider those statements given at that time in evaluating his testimony.

We now come to the next phase of my exposition of the law to you and this concerns certain definitions. What I have done up to this point is, in effect, tell you what evidence is, what evidence is not and how you evaluate it. Now we move to some definitions because in this indictment there are numbers of definitions and what I am trying to do and trying to accomplish is to put them in as simple English as we can so that you will understand

what those words mean because sometimes in law the words don't mean what they mean in your every-day language.

Now, the first three that I would call your attention to is the statement in the indictment that these defendants acted unlawfully, knowingly and wilfully because, you see, our whole system of government is predicated upon the fact that we have willpower and we have the right to do something or not to do it and since we have the right to have willpower, then we are responsible for acts which we wilfully do, which we ourselves wilfully do.

Now, in law "unlawful" means contrary to law and in this particular case it means contrary to the Federal narcotics laws and there are two involved because you will recall I told you this indictment straddled May 1st, 1971.

Before May 1st, 1971, it was Title 21, Section 173 and 174. That is the one which in explaining to you the history of narcotics is the one which says that you may not illegally import and, in addition to that, you may not receive, conceal, buy, sell or facilitate the transportation of drugs, narcotics.

Now, after May 1st, 1971, we have the other law which also prohibits the illegal importation of drugs, but in addition prohibits the distribution and possession

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2 with intent to distribute narcotic drugs.

3 So, those are the two laws essentially that we
4 are talking about when we say "unlawfully".

5 The law also makes it a crime to conspire to do
6 that, which is separate and apart from the acts themselves,
7 and so we have that other element.

8 Now, by "knowingly" we mean to do something
9 voluntarily and freely, not in good faith, not by
10 inadvertence, not by mistake.

11 By "wilfully" we add what the Romans called
12 the mens rea, the evil intent, the bad motive. So that
13 if you act wilfully, you must act knowingly and voluntarily.
14 You must act freely, you must act not in good faith, not
15 by inadvertence nor in error and you must do it with a
16 bad motive, an evil intent.

17 Now, if these defendants are not in that state
18 of mind at the time these acts are committed, they may not
19 be convicted because that is an essential part of the
20 crime.

21 The words that we are concerned with here are
22 essentially "receiving and concealing" because, as I read
23 the second count of this indictment, although there are
24 other phrases in that law, what they are charged with is
25 "did receive, conceal and facilitate the transportation

and concealment of a narcotic drug."

They are not charged -- rather Torres is not charged in that count with selling or buying. He is charged with receiving, concealing and facilitating the transportation of. What I am doing at this time is defining those words.

"Receive" has the same meaning that it has in English, ordinary usage.

"Conceal" means to hide from view. It has the same meaning that it has in English.

"Facilitate the transportation of", "transport" means, of course, to remove from one place to another and "to facilitate" is a Latin word, facile, which means to make easy, less hard.

Now, we have some other terms here to define.

"Conspire", the term "conspiracy" has been defined by Congress and essentially what it is is this, it is a very short section:

"If two or more persons conspire to commit an offense against the United States and one or more such person does an act to effect the object of the conspiracy, each shall be guilty of a crime."

That is the way "conspiracy" is defined.

I will give you the law of conspiracy in a

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minute because I am going to go into two sections of the law, the law of conspiracy, and then some other concerning the substantive offenses. I will define them further.

Now, there are two defendants that you are trying in this case now before you and there are 12 others, if my count is right, who were charged in this indictment.

Where there are two or more persons charged with the commission of a crime, the guilt of one defendant may be established without proof that all the defendants participated in every act constituting the offense.

However, as I indicated earlier to you, you must give separate consideration to each individual defendant and to each separate charge against him.

Each defendant is entitled to have his case determined from his own conduct and from the evidence which is applicable to him.

Now, there is such a concept of what is called "aiding and abetting". In other words, there is a law which was passed by Congress which reads as follows:

"Whoever aids, abets, counsels, commands, induces or procures the commission of a crime is punishable as a principal."

In order to aid or abet the commission of a crime, a person must associate himself with the criminal

2 venture, participate in it and try to make it succeed.
3 So that mere presence at a place where something is going
4 on or even knowledge that something is going on is not
5 sufficient. There must be this other element which I
6 have described to you, namely, the participation in it with
7 the object of having it succeed because mere association
8 and mere presence is not sufficient.

9 Under the old law the concept of possession was
10 important because you will recall I said to you the old
11 law, the Jones law, required not only that the substance
12 was illegally imported, but also that the defendant knew
13 that it was illegally imported.

14 Now, Congress passed what is called the pre-
15 sumption law and it said if it is proved that someone has
16 possession of something, then in the absence of an explan-
17 ation that possession is sufficient to show, No. 1, that
18 it was illegally imported and, No. 2, that he knew about it.

19 What do we mean by "possession"? Well,
20 possession is the concept which may be divided into two
21 ways. Actual possession where you physically have some-
22 thing manually that you have control over or constructive
23 possession, which means that you have the ability to do
24 something about it, to exercise dominion over it and to
25 make it move from one place to another.

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2 It doesn't depend on ownership because you can
3 go to the Hertz-Drive-It-Yourself car and Hertz owns the
4 car, but when they turn it over to you, you have got
5 possession and they give you a key and, if you ask them,
6 they will give you two keys. So that if you want to give
7 one to your daughter or son he can use the car.

8 Now, you in possession of the key, with the
9 car standing out on the street, have constructive possession
10 over it because you have the ability to take the key, go
11 out there, start the car and get moving.

12 As a matter of fact, with the other key that
13 you have, you have given constructive possession to your
14 daughter and she can go out and do the same thing.

15 This does not depend upon ownership. It
16 depends upon the ability to exercise dominion over this
17 particular piece of property.

18 It can be joint possession. It doesn't have
19 to be sole possession. In a case where the woman gets
20 the one key she keeps it herself and she doesn't give it
21 to anybody else, she has sole possession.

22 In the case where she gives a key to her
23 daughter or another key that they gave her, they have
24 joint possession. So that in this particular case if
25 you find there is possession, then as to prior to May 1st,

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1971, while that law was in existence that had this particular presumption in it, you may consider that the party not only knew, but rather the fact is that the drugs were illegally imported and that the defendant knew they were illegally imported provided you find that particular defendant had constructive or actual possession.

Now, in this case, of course, there is a great deal of testimony that all the parties involved apparently were aware that it came from South America; that it came in these picture frames, which were sent in through Customs, but aside from that you have this other element, too, which can assist you in making a determination as to that part of the case which is involved in the Sections 173 and 174 or the law which was before May 1st, 1971.

Now, the new statute after May 1st, 1971 uses the word "distribute" and that word simply means to change possession, to transfer something. A sale, for example, would be in the nature of distribution. A gift would be in the nature of a distribution. So that is what is meant by those particular words.

Now, as far as the law of conspiracy is concerned, we are now past the definitions and we are getting into the law concerning the first count.

The defendants on trial have been indicted,

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2 together with others, for the crime of conspiracy.

3 I have already defined that term. Simply put, it is an
4 agreement to commit an illegal act in violation of Federal
5 laws, namely, one, the smuggling of heroin and/or cocaine
6 into the United States.

7 two, it is also charged that prior to May 1st,
8 1971, the illegal agreement concerned the receiving,
9 concealing or facilitating the transportation of conceal-
10 ment of heroin or cocaine and that after May 1st, 1971, it
11 concerned itself with the distribution or the possession
12 with intent to distribute controlled substances, namely;
13 heroin and cocaine.

14 The crime of conspiracy may be proven even
15 though the purposes of the conspiracy were not accomplished.
16 Here, fo course, there is a claim that the purposes were
17 accomplished except for the last time when the narcotics
18 were seized.

19 The Government contends in this case that not
20 only was the agreement prove, but that the objects of the
21 agreement were, in fact, accomplished. A conspiracy is
22 a combination of two or more persons to accomplish an
23 unlawful purpose or a lawful purpose by unlawful
24 means.

25 It is not necessary that the persons charged

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2 meet together, enter into an express agreement or a formal
3 agreement or that they state in words and writing what
4 the scheme was or how it was to be effected. It is
5 sufficient to show that they tacitly came to a mutual
6 understanding to accomplish an unlawful act.

7 We are, therefore, concerned with the mental
8 operation of these parties. In deciding whether or not
9 there was an agreement the law allows you to examine all
10 the acts and declarations of the parties and then make a
11 deliberation from such evidence whether or not, in fact,
12 the agreement existed. In determining whether such
13 agreement existed, you should consider the actions and
14 declarations of all the alleged participants.

15 Similarly, in determining whether a particular
16 defendant was a member of the conspiracy, you will consider
17 all the acts and declarations of the alleged participants.

18 To be a member of the conspiracy a defendant
19 need not have known all the other members nor all the
20 details of the conspiracy nor the means by which the objects
21 of the conspiracy were to be accomplished.

22 It is necessary, however, that the Government
23 prove by credible evidence beyond a reasonable doubt that
24 the defendant was aware of the common purpose, that he was
25 a willing participant with the intent to advance the

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2 purpose of the conspiracy.

3 Here you must be satisfied that the agreement
4 consisted of obtaining the narcotics from South America
5 and transporting them in picture frames to the United
6 States for sale in the New York market.

7 The extent of a particular defendant's partici-
8 pation in a conspiracy is not determinative of his guilt
9 or innocence. A defendant may be convicted of a
10 conspiracy even though he plays a minor role. His
11 financial stake, if any, in the venture is a factor to be
12 considered in determining whether or not he is a part of it.

13 If it is established by credible evidence beyond
14 a reasonable doubt that a conspiracy existed and that the
15 defendant was one of its members, then the actions and
16 declarations of other members of the conspiracy in or out
17 of his presence, done in furtherance of the objectives of
18 the conspiracy and during its existence, may be considered
19 as evidence against him.

20 When people enter into an agreement for an
21 illegal purpose, they become agents for one another.
22 However, statements of persons which are not in further-
23 ance of the conspiracy or statements which are made before
24 its existence or after its termination may be considered
25 only as evidence against the person making them.

2 One overt act is sufficient by any one or more
3 of the persons. The act can be a legal act. Others
4 need not join in it. However, the act must be done in
5 furtherance of the conspiracy.

6 Any one of the 20 acts, which are in the
7 indictment, are sufficient to satisfy this element of the
8 conspiracy and I will again discuss that with you when we
9 get to the indictment, which will be in a minute or so.

10 The Government alleges here that there was one
11 conspiracy. The defendants allege that there was a
12 multiple conspiracy. Before the Government can get a
13 conviction in this case, you must be satisfied that there
14 was a single conspiracy.

15 Now, in this particular area we can liken a
16 conspiracy to, say, the subway system. We know, for
17 example, or I think you know that there are some subways
18 that run, say, from 180th Street down to Coney Island.
19 We know that that is a project that transports people from
20 one place to another.

21 Now, there are all kinds of people involved in
22 this. There is the fellow up in the booth that makes
23 change. There are trackwalkers. There are engineers
24 on the train. There are motormen who run the train.
25 Then there are conductors inside the train. Down at one

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end there is a place where they have an electronic device for making sure the trains don't run into one another and, of course, a fellow could be working on that system for 25 years up at 183rd Street and never know the man down in Coney Island that's got the same job as he has.

He may never realize that you can get off at 42nd Street and take the shuttle and go over to the 7th Avenue line. There are many elements involved in running this kind of a railroad, as there are in a conspiracy, which I have, in effect, mentioned to you as I went through this law of conspiracy.

There is no need that they know one another. There is no need they do every act that is concerned in order to fulfill the conspiracy.

What is needed is that they are part of a single venture which is trying to accomplish a purpose.

Now, we know that if a man is in business in South America to sell drugs and he wants to get it up to the United States, he must do it in some fashion. Therefore, he needs somebody that will help in transporting it. In this particular case in putting it into the picture frames, we know that there must be somebody that is going to receive it when it gets to the United States. It just can't hang in mid air like the Flying Dutchman.

1 os13

2 When it gets here somebody must take care of it. In this
3 case case it was Ruiz. He was the middle figure in
4 all of these transactions. He handled every one of them
5 as far as we can tell from the evidence.

6 Then, there must be people here who must take
7 it out. In this case it was Ruiz and give it to somebody
8 else. Now, the narcotics then must reach some other person
9 who in turn will take his place in the particular area in
10 which he is.

11 Now, it is not necessary for all these people to
12 know one another. They know that there must be somebody
13 in South America that puts the drugs up originally.
14 They know that there must be somebody that transports them
15 and, so, as you go down each level of this, there must be
16 inferences that you can draw. I don't suggest that you
17 have to, but I say that you possibly can draw inferences
18 that there are aware of all this activity.

19 Now, one of the arguments between the parties
20 here is is this a single conspiracy or is it a multiple
21 conspiracy? Before the Government can obtain a con-
22 viction in this case, they must satisfy you by credible
23 evidence beyond a reasonable doubt that it is a single
24 conspiracy. It is not all the same people involved all
25 the time, but it was one single conspiracy in the sense

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that the scheme was thought out, it was planned to operate in this fashion. People moved in and out of it as time went on, but essentially it was the same scheme. That is the Government's contention.

Mr. Schwartz, you remember, drew on the black-board here three different conspiracies and a possible fourth one. Well, it is up to you to make a judgment which one this is.

If you find by credible evidence beyond a reasonable doubt that a single conspiracy existed, as charged in the indictment, and that during the existence of that single conspiracy one or more overt acts alleged was done by one or more of the co-conspirators in furtherance of the conspiracy, proof of the conspiracy is complete. It is complete as to each defendant found by you by credible evidence beyond a reasonable doubt to have been unlawfully, knowingly and wilfully a member of the conspiracy at the time the overt act was committed regardless of which of the conspirators committed the act.

So that essentially is the law of conspiracy.

We will now take a five-minute recess at which time we will go into the indictment, which I don't think will take much longer and that will be the final exposition of law in this case.

I will go through the indictment with you so that you will be familiar with it and understand how to approach the problem. We will take a five-minute recess.

Please don't discuss the case in the meantime.

(Recess.)

(In open court; jury present.)

THE COURT: We now come down to the closing part of this and some of this may sound repetitious to you and I intentionally do it because I know that you are not lawyers and these concepts you have probably heard for the first time when you came into the courtroom so that it is done intentionally so you may really understand what your obligations are in reference to this case.

The indictment is this document, which I am holding in my hand, and which your forelady will get a copy of and which you may all examine in the jury room.

I want to explain to you essentially how it is drawn up and what is necessary before you may convict either defendant on any other charges that they are charged with before you.

Have you got a clean copy of the indictment?

I asked him to show it to you before. Did the defendants look at it?

MR. SCHWARTZ: No, your Honor.

os21

THE COURT: I took out overt act No. 3, which I struck out, and the rest of it is the same.

MR. SCHWARTZ: It appears to be all right.

THE COURT: No. 3 isn't in there, is it?

MR. SCHWARTZ: No, sir.

THE COURT: Give it to the forelady then.
Thank you.

MR. SCHWARTZ: I didn't show it to Mr. Brown.

MR. BROWN: I will take the representation of Mr. Schwartz.

THE COURT: Give it to the forelady.

If you will look at this indictment, on the front page you will notice it says "Count 1. The grand jury charges . . ." and the named defendants are up at the top.

Is there more than one of these copies?

MR. LITTLEFIELD: We have a whole stack of copies, your Honor, but they are faint but I think they can be read. They are very faint, your Honor. I think they can be read. They have overt act No. 3 out.

THE COURT: Do those have No. 3 out?

MR. LITTLEFIELD: Yes, No. 3 is out.

THE COURT: He makes such a representation, Mr. Schwartz and Mr. Brown, do you accept that?

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2 MR. SCHWARTZ: I do, your Honor.

3 MR. BROWN: Yes, your Honor.

4 THE COURT: Hand those around so you can look
5 at them while I am going through this.

6 Now, you will notice at the head there are 14
7 defendants there and we are trying only two and they are
8 the only ones you are concerned with. You don't have to
9 make any judgments as to anybody else.

10 Then, it says, "Count 1. The grand jury
11 charges . . ." and, as I warned you before, this is not
12 evidence. It is only an accusation. The defendants
13 have denied it and they have put to issue every material
14 fact.

15 Then, the first sentence starts:

16 "From on or about the 1st day of July 1970
17 and continuously thereafter up to and including the
18 date of the filing of the indictment."

19 The date of the filing of the indictment is in
20 May 1974, the exact date I don't have.

21 What is the exact date?

22 MR. LITTLEFIELD: March 9, 1974.

23 THE COURT: March or May?

24 MR. SCHWARTZ: May 9, 1974, your Honor. I am
25 almost positive.

THE COURT: I don't think it is March.

May 9th, 1974.

That means that the Government has to prove that these acts, which they are charging, happened in that period. It doesn't have to go from the beginning to the end, but it must be within those two periods. That is the first thing you must find.

MR. LITTLEFIELD: It is May, your Honor.

THE COURT: All right.

Then, it says the number of defendants and it names these two defendants as well as others.

Then it goes on to say that some people were conspirators and some people were unknown to the grand jury.

Then we come to the first legal term I defined for you, "unlawfully, intentionally and knowingly" so that means against the Federal statute, namely, the narcotics control law.

The intention must be something they do freely and voluntarily, it mustn't be by accident. It must be specifically intended by them.

"Knowingly" means of course, in the same vein, namely, that they did it voluntarily and not through mistake or inadvertence. However, this concept here

1 os24

2 includes the concept of the three words together that
3 they must be acting with a bad motive and an evil intent.

4 So, then, the next combination of words are
5 essentially what "conspire" means, to combine, conspire,
6 confederate and agree. That is the conspiracy charged.

7 What they are charged with conspiring to violate
8 are certain sections, the numbers of which appear on the
9 bottom there.

10 The first two of them, 173 and 174, are the
11 old law. All the others, except Title 2, if it in here,
12 I don't know if it is in here, no, it isn't in here, all
13 the others are the new law, so that is what they are
14 charged with conspiring. That is essentially the con-
15 spiracy charge right on the first page. That's it.

16 Now, then, we go from Paragraph 2 through
17 Paragraph 6(c). These are the means by which the con-
18 spiracy was to be accomplished.

19 Now, the Government doesn't have to prove all
20 the means. It has to prove at least one means that all
21 of you agree on. You have to be unanimous on the means so
22 it can be any one of the means starting with Paragraph 2
23 and going through 6(c).

24 For example, the first one concerns No. 2.
25 It is the old law under 173, smuggling into the country.

Paragraph No. 3, the means, still the old law, prohibits the receiving, concealing or facilitating the transportation or concealment of.

No. 4 means is the new law which prohibits the smuggling of heroin or cocaine into the country.

No. 5 is also the new law and that prohibits the distribution and possession with intent to distribute.

No. 6 concerns a number of other means. For example, (A) talks about Yolanda Sarmiento and Banderas and that activity.

(B) is Lopez and concerns buying in the United States.

(C) concerns Torres, Rivera and Cancio.

The Government, as I indicated before, doesn't have to prove all of these means. The proof of any one of them to your satisfaction by credible evidence beyond a reasonable doubt is sufficient, but I again stress that you must all agree on the means.

The Government, of course, contends that they have proven every one of them, but you do not have to find every one of them. One is sufficient if you all agree on that particular means.

Now we come to the overt acts. It says:

"In pursuance of this conspiracy and to effect

1 os26

2 the objects, the following overt acts were
3 committed."

4 I am not going to go over them, but it is only
5 necessary for the Government to prove one of those but
6 all of you must agree on at least one. There must be
7 unanimous agreement on at least one.

8 The Government here again contends that they
9 have proven every one of them.

10 I have removed one of them from your consider-
11 ation so there is a jump between 7 and 9. I have removed
12 No. 8 so you don't have to consider that one at all. You
13 don't even have it before you.

14 If you find, as far as this conspiracy count
15 is concerned, these elements which I have just gone over
16 with you by credible evidence beyond a reasonable doubt,
17 then it is your obligation to convict the defendant that
18 you are considering at the particular time. Since this
19 concerns both defendants, you will do it one at a time
20 separately and consider the evidence separately as to
21 each.

22 If you find that any one or more or all of these
23 elements have not been proven by the Government by cred-
24 ible evidence beyond a reasonable doubt, it is your
25 obligation to acquit the defendant you are considering.

Here you will consider, as I indicated before, each one separately.

Now we get to Count 2. That is substantive count. That is separate and apart from the conspiracy and you must find these elements before you may convict the defendant Torres on the first count.

You will find here again "The grand jury charges . . ." and, as I said, that is only an accusation, "that on or about the 12th day of January 1971 in the Southern District of New York" -- and you must find that it was on or about that day and that it was in this district -- "the defendant Torres, together with Lopez and Franco" who we have been calling Miguel Aspilche, "the defendants, unlawfully, wilfully and knowingly ..."

Here again those three words I have explain to you before and you are aware of what they are.

"Did receive, conceal and facilitate the transportation and concealment of a narcotic drug, to wit, approximately 20 kilograms of a narcotic drug."

Now here, of course, the Government doesn't have to prove all of those four things. They don't have to prove that he received it, that he concealed it and that he facilitated the transportation or concealment of it.

1 os23

2 Any one of those is sufficient. That is in the dis-
3 junctive.

4 Now, the question of whether it is narcotic
5 drugs. That must be determined by you from the evidence
6 in the case. The drugs weren't seized at the time and,
7 therefore, the chemist never got a chance to analyze them,
8 but you know what the dealings were between the parties
9 who had shipped this drug. You know that on some
10 occasions some of them tasted it and on other occasions
11 tests were made and on other occasions it was described
12 as a white powder.

13 We know that the amounts of money involved were
14 large sums of money and so from all the evidence in the
15 case in this particular area you will determine whether or
16 not, in fact, they were dealing in a narcotic drug.

17 It says:

18 "After the said narcotic drug has been imported
19 into the United States contrary to law, knowing that
20 the narcotic drug had been imported and brought into
21 the United States contrary to law in that the import-
22 ation of said narcotic drug into the United States,
23 except in such quantities" and so forth "for medical
24 purposes" and that is the end of that particular
25 thought.

1 os29

2 Now here you have got to go into that discussion
3 that I told you about, actual and constructive possession.
4 If you don't feel there is sufficient evidence in here
5 to show that these defendants knew this was coming from
6 South America and so forth, then if you find that that
7 doesn't satisfy you, you may consider whether or not they
8 had actual or constructive possession.

9 Of course, when you have multiple people acting,
10 they don't all have to do the same thing as I explained to
11 you earlier in my remarks. So that if you find that the
12 Government has satisfied You as to each of these elements
13 in Count 2 beyond a reasonable doubt by credible evidence
14 as to the defendant Torres, you should convict the defend-
15 ant Torres.

16 On the other hand, if the Government has failed
17 to prove any one or more or all of these elements as far
18 as this defendant Torres is concerned, then it is your
19 obligation to acquit him.

20 Counts 2 and 3 are exactly alike, but one deals
21 with Anthony Torres and the other deals with Roberto
22 Rivera.

23 MR. BROWN: Your Honor, No. 4.

24 MR. SCHWARTZ: 3 and 2 are alike.

25 THE COURT: 3 and 2 are the same, yes. I stand

1 os30

2 corrected.

3 MR. LITTLEFIELD: 3 and 4, your Honor.

4 THE COURT: 2 I just got through with. That
5 was 173 and 174.

6 Now, what I am saying is 3 and 4 are based on
7 the same statutes and they are based on the new law.
8 There is no need there for the defendants to know that
9 it was illegally imported under that statute. What the
10 Government must prove is as follows:

11 That on or about the 19th day of May, in Count
12 3, 1971, in the Southern District of New York, and you .
13 must find that as a fact, the defendant Torres, together
14 with the others, Lopez and Miguel Aspilche, unlawfully,
15 intentionally and knowingly did distribute and possess
16 with intent to distribute a Schedule 2 drug.

17 I tell you that heroin and cocaine are a
18 Schedule 2 controlled drug. The quantity involved is
19 10 kilograms so that here again you must find each one of
20 these elements by credible evidence beyond a reasonable
21 doubt before you may convict the defendant Torres.

22 On the other hand, if you find that the Govern-
23 ment has failed to prove any one or more or all of those
24 elements, then you must acquit the defendant.

25 The same discussion applies to Count 4 with

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reference to the defendant Rivera. Here again the date
is the same, May 19th, 1971, and the other elements are the
same.

Now, in this regard if you find that there was
a conspiracy and the conspiracy as charged by the Govern-
ment, then anybody that is in that conspiracy is respons-
ible for a substantive offense committed by any co-
conspirator committed in furtherance of the conspiracy
even though that party does not participate in the sub-
stantive offense or have any actual knowledge of it.

You must be satisfied beyond a reasonable
doubt, however, one, that the substantive offense was, in
fact, committed by one or more members of the conspiracy.

Here it is alleged that the one that was active
in this particular area was Miguel Aspilche and that is
the contention of the Government.

Of course, the defendants' position is otherwise.
You will have to make the judgment yourself on that.

The next thing is that the defendant, whose
guilt you are considering, was then a member of the
conspiracy, so if these defendants were not members of
the conspiracy and you have determined that, then, of
course, would not rub off on him and they would not be
responsible in these counts.

1 The third thing you must find is that the act,
2 which constituted the offense, was done in furtherance
3 of the conspiracy. Of course, that you will have to
4 determine from the date and the incidents that surround
5 these particular events.
6

7 So that concludes the indictment. There are
8 a few more remarks that I make before I consult with the
9 lawyers. They are very simple remarks.

10 They are common sense. They are, in effect,
11 telling you to live up to your oath as a juror.

12 The first is that sympathy and bias play no
13 part in this case whatsoever.

14 The second is that possible punishment in this
15 case is of no concern of yours whatsoever. That is the
16 concern of the Court in the event it comes to pass, but
17 that can't help you decide the facts at all because punish-
18 ment has nothing at all to do with what the facts were.

19 The next thing is that your verdict must be
20 unanimous, Madam Forelady, on all of these counts. In other
21 words, when you come back again with the jury, you will be
22 asked: Have you reached a verdict? and when you report
23 that you have, then you will be asked as to Count 1, the
24 conspiracy count, how do you find and you will report
25 whether you find guilty or not guilty, but it must be

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unanimous.

The same thing applies to the three substantive counts, the same kind of verdicts, either guilty or not guilty, but they must be unanimous.

All the verdicts must be unanimous. Is that clear?

As Mr. Schwartz and other lawyers, I think they all suggested it to you, if they didn't do it actually, by inference they did, if there comes a time when you have a dispute between yourselves as to what was the evidence in the case, it has all been transcribed and it is all in written form right now so that any time you want any portion of it read to straighten out any point that comes up in your discussions, please tell us the name of the witness you are concerned about, whether it is on direct or cross-examination. In other words, pinpoint it as best as you can and we will then have it read to you so that you determine the facts yourselves.

Now, I have one last discussion with the lawyers before I give you the case. I may say this:

That if there are any communications that are to come to the Court, they must come through your forelady and they will be in writing and put down as clear an exposition of what you want to know in writing as you can

1 os34

2 and then she will seal it and give it to the marshal who
3 will give it to me and I will answer it for you.

4 If you will just excuse me we will have one last
5 talk with the lawyers.

6 (At the side bar.)

7 MR. SCHWARTZ: Could we go inside?

8 THE COURT: Yes.

9 (In open court.)

10 THE COURT: Apparently they think they are going
11 to talk loud so I will take them inside so you can't hear
12 this. This is a discussion on the law.

13 (In the robing room.)

14 THE COURT: We will start in with the exceptions
15 first of the defendant Torres.

16 MR. SCHWARTZ: All right.

17 If your Honor please, I most respectfully except
18 to that portion of your Honor's charge that failed to
19 marshal the evidence in this case.

20 THE COURT: Do you want me to marshal the evi-
21 dence?

22 MR. SCHWARTZ: Just hear me out.

23 THE COURT: Because I have got it written out
24 and I will read it all over again, but it is subject to
25 that criticism which you made with Mr. Littlefield that all

1 os35
2 I will have is the Government's case.

3 MR. SCHWARTZ: Your Honor, my problem is this:

4 That is exactly the problem. That is the
5 danger inherent, of course --

6 THE COURT: You either want me to marshal the
7 evidence or you don't. I am willing to marshal the
8 evidence. I have it written on six pieces of paper, and
9 I will marshal the evidence if you want me to.

10 MR. SCHWARTZ: I would want you to providing you
11 marshaled it both with regard to redirect and cross-
12 examination of the various witnesses who testified. Other-
13 wise, no.

14 THE COURT: I wrote it out and I got what I think
15 is both sides of this thing and if you want to hear that,
16 that is well and good. I will tell them it.

17 MR. BROWN: I will take an exception to that,
18 Judge.

19 THE COURT: To me it is kind of silly because
20 the only evidence in the case is the Government's witnesses.

21 MR. BROWN: I think that is dangerous. That
22 shows a preponderance of evidence.

23 THE COURT: That is exactly why I didn't do it.

24 I can understand it if the 14 defendants were
25 in the case and the 14 defendants were contesting the case

1 os36

2 and then you had a confusion as to who was the importer,
3 who was the exporter, who was in this vein of it, but
4 here are two allegedly major purchasers. That is all
5 they are supposed to be, nothing more and nothing less.

6 MR. SCHWARTZ: In connection with what your Honor
7 told the jury about inferences to be drawn from the
8 evidence, I take exception to that part of your Honor's
9 charge and I would ask your Honor to charge this jury that
10 if there are two inferences to be drawn --

11 THE COURT: Tell them what happened in our
12 District on that one. The Second Circuit does not
13 approve of that.

14 MR. SCHWARTZ: You are going to tell me. You
15 don't seem to get the message I'm trying to get across to
16 you. Does this look like my handwriting to you?

17 THE COURT: Then he's forgotten.

18 MR. KRIEGER: It is not mine either.

19 THE COURT: It is Senor Torres.

20 MR. SCHWARTZ: Two inferences to be drawn from a
21 given set of facts, and the inferences which is most
22 favorable to the defense must be drawn by the jury.
23 I would ask your Honor to charge that.

24 MR. BROWN: I will join in that, your Honor.

25 THE COURT: I will deny that. What I mean by

1 os37
2 that is this:

3 That I am granting the exception, but I am
4 denying the charge.

5 MR. SCHWARTZ: Yes, sir.

6 Your Honor, I take exception to that part of
7 your Honor's charge as it dealt with circumstantial
8 evidence.

9 MR. BROWN: Likewise, your Honor.

10 THE COURT: Your exception is noted.

11 MR. SCHWARTZ: I respectfully request your Honor
12 to charge with circumstantial evidence, that circumstantial
13 evidence must be accepted only if it precludes all other
14 inferences save that of the guilt of the defendant based
15 upon proof beyond a reasonable doubt.

16 THE COURT: The exception is noted and the
17 request is denied.

18 MR. BROWN: I will take that same exception.

19 THE COURT: All right.

20 MR. SCHWARTZ: Your Honor, I am not quite sure
21 what you told this jury about the failure of the defendants
22 to testify.

23 THE COURT: I didn't say a word and I will say
24 it. I just slipped up on that.

25 MR. SCHWARTZ: That is why I wanted to bring

1 os38

2 that up.

3 THE COURT: Do you want me to say it?

4 MR. BROWN: Of course.

5 THE COURT: Sometimes it stresses the point that
6 he didn't take the stand.

7 MR. SCHWARTZ: What your Honor usually does, I
8 would like in addition is to perhaps include the language
9 that a defendant may not testify because of lack of knowl-
10 edge of the language, lack of education or fear of speaking
11 before a group of individuals like a jury.

12 THE COURT: Well, I decline to do that, but I
13 will give the statement that he does not have to take the
14 stand. The fact that he did not take the stand cannot
15 be used against him and there is no presumption or infer-
16 ence of guilt that arises from such conduct.

17 MR. SCHWARTZ: Your Honor, with regard to the
18 second count, it appears that since cocaine is in the
19 second count that your Honor --

20 THE COURT: I know what you are going to say
21 and I tell you now I will do it, but I purposely didn't
22 do it because the quantity was such a large amount that I
23 think it is killing a dead horse. If you want to hear it,
24 I will do it.

25 MR. SCHWARTZ: There is one more thing along

1 those lines, your Honor. It is my understanding that
2 in order to call the presumption under the old law into
3 play that the Government has to establish possession by
4 clear and convincing evidence and in this case the
5 possession, as it exists, would only be established through
6 actually a hearsay declaration, which rightly admitted
7 under the conspiracy count should not be admitted under
8 the substantive count.
9

10 This is one of the problems and one of the
11 quarrels I have with the Pinkerton situation as it applies
12 in this particular case.

13 THE COURT: I understand that.

14 MR. SCHWARTZ: Your Honor, I would also say to
15 your Honor that I would ask your Honor and I would except
16 to that portion of your Honor's charge concerning member-
17 ship in the conspiracy and as your Honor to include or
18 amplify that to this jury and tell them that in determining
19 whether or not an individual is a member of the conspiracy
20 that the jury should only consider the acts and declarations
21 of that individual and his acts and conduct as it may
22 relate to other members of the conspiracy.

23 THE COURT: I have already ruled on that in your
24 requests, but I will rule on it now and deny it now also.

25 MR. BROWN: Exception.

1 os40
2 MR. SCHWARTZ: Your Honor, now I would like to
3 go back to the whole business of multiple conspiracies.
4 This is my sheet and now I can cover my own.

5 THE COURT: Okay.

6 MR. SCHWARTZ: Your Honor, I have to most
7 respectfully state to your Honor that in my opinion what
8 your Honor said to this jury about multiple conspiracies
9 is somewhat similar to the all or nothing charge that I
10 feel the Circuit has condemned in the Kelly and other
11 cases of similar nature.

12 The facts of this case are somewhat unique.
13 I think it is somewhat unique that we have in this District
14 Court at this time so many actual core members of the
15 conspiracy, as I feel they exist, that have come here to
16 testify.

17 I asked your Honor before the charge
18 was given earlier this morning to consider the fact that
19 this jury could consider, A, that Miguel Aspilche had
20 withdrawn affirmatively from the Sarmiento, et cetera
21 conspiracy and that he did form another conspiracy or
22 another group, if you don't want to use the language
23 "conspiracy", with Mr. Wladimir Banderas and that ultim-
24 ately I think the evidence is clear, even by Mr. Little-
25 field's own admission, that there came a point in time when

1 os41

2 Mr. Mazza somehow hooked himself into another conspiracy
3 involving people in France, this Mr. Condemine, et cetera,
4 and they began a whole new importation scheme into the
5 United States even though there is a point in time when
6 Mazza goes back to Sarmiento with the 18 kilograms of
7 heroin.

8 THE COURT: The last seizure, yes.

9 MR. SCHWARTZ: But, nevertheless, the proof in
10 this case establishes an independent or another group that
11 Mazza goes in to separate and a part from Sarmiento.

12 Now, it is an unfortunate thing that these people
13 who are possessed of such enormous resources and devices
14 have connections all over the world, but that is not the
15 defendant's fault. The Government could have elected to
16 narrow the scope of this conspiracy and proceed upon much
17 more narrow terms more closely related to the evidence.

18 THE COURT: I see there is a central figure
19 here, Ruiz. There is a central buyer here, Aviles.
20 The seller here is Sarmiento and Mazza so you are talking
21 about, you know, that's like the guy saying, taking the
22 shuttle to Grand Central, from Grand Central to the west
23 side, that that breaks up the conspiracy. It is there
24 just as big as it was before.

25 MR. SCHWARTZ: Your Honor, I think this is the

1 os42
2 point that we don't agree upon. Your Honor, I can under-
3 stand the rationale of persons entering, leaving and so
4 forth. That is easy.

5 I can understand that and I could understand
6 probably when Congress drafted the conspiracy law and when
7 the Circuit started to interpret it they never had a situ-
8 ation that I know of or that I can find in the record that
9 is so closely related to the nucleus of the conspiracy.

10 That is why they talk about all these secret
11 meetings. There is nothing secret about what was going
12 on here. There people knew everything that was going on
13 here. That is why Banderas can come in and tell us,
14 I had nothing to do with Sarmiento. Sarmiento had
15 nothing to do with me.

16 THE COURT: I don't want to elongate this, we
17 are going to be a long time to start with, and what I intend
18 to do is keep them here until about 10 o'clock and if they
19 don't agree I will sequester them, so I think we ought
20 to get to them because I think you have stated the basis
21 of your objection.

22 I am only talking about this one here, the
23 multiple and the single conspiracy, and I take your
24 exception. I note it, but I refuse to charge any further
25 on it.

MR. SCHWARTZ: There is one thing I think Mr. Krieger asked me to point out because I think he picked it up and I wasn't sure.

Did your Honor tell this jury that I had contended that there were three, if perhaps not four, conspiracies?

THE COURT: That is what I thought I did.

MR. SCHWARTZ: I did, too, but what Mr. Krieger pointed out, I'm not quite sure that I heard it that way, that is why I am asking, did your Honor say, in order to find the defendant Torres guilty they have to find if he participated in one?

THE COURT: In this single conspiracy that the Government charges. That is what I said.

MR. BROWN: If there is a single conspiracy.

THE COURT: That is what I am saying.

MR. SCHWARTZ: If they find, on the other hand, that there were, in fact, three or four separate conspiracies, they must find him not guilty.

THE COURT: That was the inference.

MR. SCHWARTZ: I would merely ask you to just put that language, that if they find, in fact, there were three or more conspiracies operating --

THE COURT: That is not my thought either. You

1 had that thought this morning, too, and I told you that
2 I could see there could be two or three other offshoots
3 of this thing and still in all a defendant still be mixed
4 up in a single conspiracy in addition to any other activity
5 he had with the others.
6

7 MR. SCHWARTZ: Don't you have a terrible prejudice
8 here then, your Honor? Don't you have a terrible spill-
9 over that would never come in if these counts were severed?

10 I am not talking just about a better chance
11 of beating the case. I am talking about real prejudice
12 to the defendant by way of evidence.

13 MR. KRIEGER: Could I violate the two-headed
14 rule?

15 THE COURT: Yes.

16 MR. KRIEGER: Your Honor, the way I heard that
17 portion of your charge, it sounded to me as if your Honor
18 had instructed the jury that if they found one of the three
19 or four conspiracies to which Mr. Schwartz alluded in his
20 argument, they could find the defendant guilty. I don't
21 think you intended that.

22 THE COURT: No, what I said, in effect, was that
23 Mr. Schwartz contends there are three or four conspiracies,
24 three conspiracies and an offshoot to make it four.

25 Now, of course, if there are multiple conspir-

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2 acies here, the inference I intended was, I don't know
3 whether I specifically said it, is that it is possible that
4 Torres could not be found guilty and the only way they
5 could find him guilty would be if he were still part of
6 the single conspiracy that is alleged by the Government.
7 Regardless of all this other stuff that is going on, they
8 would still have to put him in that before they could
9 convict him.

10 That was the intent of it and that is what I
11 think I said to them.

12 MR. BROWN: I don't think that is what we
13 intended. What my impression was, and I may be wrong,
14 is that if the jury finds that there is more than one
15 conspiracy and there are multiple conspiracies, then they
16 cannot find --

17 THE COURT: That isn't the law.

18 MR. BROWN: Unless they pin him down to one
19 specific thing.

20 THE COURT: It was worse than this case that
21 went up on appeal. If they find that he is still in the
22 conspiracy, which involves Sarmiento and Mazza and all
23 these other people, regardless of what he has done with
24 anybody else and regardless of any other conspiracy proven,
25 he is still stuck with this one.

MR. BROWN: The point is this:

If there are three separate conspiracies, then there is no conspiracy as the Government alleges.

THE COURT: If he is still in the one the Government alleges that was originally started and the others are offshoots of it, he is still stuck and still in it.

MR. BROWN: If they are offshoots. Suppose they are all individual conspiracies.

If I'm in business with you and then I go in business for myself, your customers are not liable --

THE COURT: I think you have made your point. You can argue from this point on with this multiple and single conspiracy, but I think we ought to go on to something else.

MR. SCHWARTZ: Your Honor, with regard to your Honor's charge concerning the accomplice testimony, I most respectfully except to your Honor's failure to charge as set out in U. S. against Pageant.

THE COURT: I read that and I declined to do it this morning.

You have an exception to that.

MR. SCHWARTZ: Your Honor, again I most respectfully except to that part of your Honor's charge as it dealt with the circumstantial proof of the existence of the

1 narcotic drug. I realize that perhaps your Honor was
2
3 framing it under Agueci.

4 THE COURT: It was under Agueci.

5 MR. SCHWARTZ: What I am saying is, at least it
6 was my impression, your Honor, that this jury could come
7 away feeling that they can facts that may be established
8 under one substantive count and apply them to others
9 because the fact that it was a white powder and the fact
10 that it was this or that may have only been established
11 as to one count and there is absolutely no evidence with
12 regard to any other.

13 THE COURT: I think I charged that it should be
14 under all counts, but the point of the matter is that I
15 left even part of it out from Agueci which could have
16 been charged.

17 I also left out the part that the seizure was
18 actually narcotics and it was tested and purposely I
19 didn't put it in because I felt I didn't want to go that
20 far. I think I gave sufficient guidance to the jury.
21 The exception is noted.

22 MR. BROWN: For the record, your Honor, I will
23 adopt each and every exception set forth by Mr. Schwartz
24 with the exception of the marshaling of the evidence, which
25 I object to.

THE COURT: I am ruling with you on that.

MR. SCHWARTZ: I am reminded that I should repeat the requests previously made and I should take exception to your Honor's refusal to previously follow the submitted requests.

THE COURT: The rulings of the Court were objected to on both defendants' parts and I overruled them and I continue to overrule them.

MR. SCHWARTZ: Your Honor, it would appear in this indictment that the way the indictment is drafted you have got a conspiracy allegedly, of course, running between the old and the new law.

THE COURT: Yes, straddling it.

MR. SCHWARTZ: Should there be --

THE COURT: Now, if you want that, I am telling you now -- pardon me for running ahead of you because I have been doing this before so I know these points -- I will not sentence under the old law. The old law will not apply here.

MR. SCHWARTZ: We have nothing more to say on the subject.

THE COURT: Okay, unless you want a special verdict, which I don't agree you can give. I don't think Judge Palmieri is right.

MR. SCHWARTZ: We don't want a special verdict.

MR. KRIEGER: Judge, we are quitting.

MR. LITTLEFIELD: I would only ask that aiding and abetting be charged with respect to the substantive count.

THE COURT: I charged aiding and abetting and I decline to go further into it. I am going to tell them about cocaine unless you want to withdraw that. I am going to tell them when they reach these quantities --

MR. SCHWARTZ: I withdraw the cocaine exception.

THE COURT: All right.

(In open court within the presence of the jury.)

THE COURT: The marshals will be sworn, please.

(Marshals sworn.)

THE COURT: All right, the first order of business will be to get them out to eat.

MR. SCHWARTZ: Your Honor, just to remind you, you said you were going to include one thing about the testifying of the defendants.

THE COURT: Yes, I am sorry. I have said this so many times I assume you know it and I will do it off the top of my head because I think I know this area well enough.

The defendant need not take the stand. The

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2 defendant need not prove his innocence. A defendant
3 need not produce any evidence.

4 The fact that he does not take the stand may not
5 be used against him. You may not presume or infer guilt
6 on his part because of his absence in taking the stand.
7 It should not and must not enter into your discussions in
8 arriving at the facts.

9 All right, we have to excuse the alternate,
10 Mr. Mahoney.

11 Mr. Mahoney, I thank you very much for being
12 with us and I appreciate it and your services are just as
13 valuable as if you were going to give a verdict in the
14 case.

15 You are excused with the thanks of the Court.

16 (Alternate Juror Mahoney excused.)

17 THE COURT: Now, the first order of business
18 will be your meal and in order not to get ulcers I would
19 suggest you don't even start to discuss this case until
20 you eat and come back again.

21 THE FORELADY: May we send messages home?

22 THE COURT: I am sure the parties will agree
23 that they can send messages home?

24 MR. SCHWARTZ: Yes, your Honor.

25 MR. BROWN: Definitely.

1
2 THE COURT: The marshal will do that for you
3 and I would say to you, don't go in with a preconceived
4 idea of who is guilty and who isn't or what.

5 In other words, leave your mind completely open
6 at this point and then when you enter into your discussions,
7 do that in good conscience and when you come up with a
8 verdict that is in accord with your conscience, no one
9 can criticize you.

10 THE FORELADY: Your Honor, do you mind going
11 over the two narcotic laws again, the difference?

12 THE COURT: 173 and 174 was before May 1st,
13 1971. Those laws prohibited the illegal importation,
14 we could say smuggling, into the United States of heroin
15 and cocaine.

16 Another thing they prohibited was the receiving,
17 concealing, buying, selling or facilitating the trans-
18 portation or concealment of a narcotic drug, namely, cocaine
19 or heroin. That is the first law.

20 The second law very simply put says we are going
21 to make a list of different kinds of drugs. They are
22 called controlled drugs and heroin and cocaine are in that
23 list and it says, this:

24 You may distribute or possession with the
25 intent to distribute a controlled substance.

That simply put are the two laws.

THE FORELADY: Thank you.

MR. LITTLEFIELD: The new law also has an importation prohibition.

THE COURT: I said that. Both prohibited importation and one prohibits the --

JUROR NO. 9: Did you say that in order to find either defendant guilty on Counts 2, 3 and 4 we first have to find him guilty on Count No. 1?

THE COURT: Oh, no, no. You can find them guilty on Count No. 1 only. No, there is no need for that. JUROR NO. 9: They are all completely separate?

THE COURT: You discuss each crime separately and make a judgment as to each crime separately on the elements that I have described to you in that particular crime.

All right, you may retire and deliberate.

MR. SCHWARTZ: Your Honor, is it a matter of fact that the jury is going out to dinner?

THE COURT: Yes.

MR. SCHWARTZ: Can we go, too?

THE COURT: Yes, I would say for at least an hour and a quarter and if you would be so kind to let Mr. Farley know where you are going, if anything happens,

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2 we may locate you, but I don't think there will be any
3 need for at least an hour and a quarter.

4 When they come back may they have the exhibits
5 if they call for them and I will have the authority for
6 the marshal to bring them in to them?

7 MR. SCHWARTZ: Surely, your Honor.

8 THE COURT: All right, you may retire.

9 (The jury retired for dinner and after dinner
10 to commence deliberating at 5.50 p.m.)

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(At 9.10 p.m., a note was received from the jury.)

(Court's Exhibit 4 marked.)

THE COURT: I have a note from the jury stating:

"We want the direct testimony dealing with the approximately two or more kilograms of cocaine mentioned in Count 4 pertaining to Roberto Rivera."

MR. LITTLEFIELD: 394 is where we start.

THE COURT: This is Cancio's direct testimony?

MR. LITTLEFIELD: That is right.

THE COURT: Bring in the jury.

MR. SCHWARTZ: There is also some direct testimony, your Honor, in Banderas.

THE COURT: We will first read this to them and we will get to Banderas next. We will take that up at the side bar.

MR. SCHWARTZ: This is concerning the same thing.

THE COURT: Show it to Mr. Littlefield.

MR. LITTLEFIELD: Banderas doesn't talk about Roberto Rivera at any point.

MR. SCHWARTZ: I think that is important for them to hear.

THE COURT: I don't know whether it is important

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2 or not. This definitely does and then we will take the
3 other matter up at the side bar. We can also find out
4 from them whether this is what they want.

5 (Jury present.)

6 THE COURT: I have a note from the jury which
7 reads:

8 "We want the direct the testimony dealing
9 with the approximately two or more kilograms of
10 cocaine mentioned in Count 4 pertaining to Roberto
11 Rivera."

12 Now, I assume from that question that you are
13 talking about the witness Cancio and his direct testimony?

14 All the jurors seem to be nodding in the
15 affirmative.

16 Now, that testimony we are going to start to
17 read at page 894 and when you get to the point that you
18 have heard as much as you want in that particular area,
19 you indicate to me that you have heard enough when the
20 point comes in time.

21 All right.

22 (The record was read commencing at page 894
23 through page 907.)

24 JUROR NO. 5: We are definitely looking for the
25 portion that speaks about the two kilograms of cocaine.

MR. SCHWARTZ: Can we approach the side bar, your Honor?

THE COURT: Yes.

MR. LITTLEFIELD: I don't think there is any specific testimony about two kilograms.

THE COURT: There is no mention of that definite amount. It is about and the money gives you a clue as to the quantity.

MR. SCHWARTZ: Your Honor, there is no mention of even an amount.

MR. LITTLEFIELD: We just said that.

MR. SCHWARTZ: Not even "about".

THE COURT: I said there is no mention of any two kilos or anything else, but when you figure the money that is the only clue you have.

MR. SCHWARTZ: Your Honor, can we come to the side bar?

THE COURT: Wait a minute. Let's find out if the jury wants anything more read. They are the ones that are concerned with this.

MR. SCHWARTZ: There is some more that throws light on this, your Honor.

THE COURT: I can understand that, but at this time we are at the request of the jury so we will do what

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2 they ask.

3 (Pause.)

4 JUROR NO. 9: I think we are set.

5 THE COURT: You want any more read?

6 JUROR NO. 5: N, that is sufficient.

7 THE COURT: Is there anybody else that wants
8 anything read?

9 THE FORELADY: I don't think so, no.

10 THE COURT: All right, thank you. You may
11 retire.

12 (The jury retired to deliberate further at
13 9.35 p.m.)

14 (At 10.10 p.m. the jury announced a verdict.)

15 (In open court; jury present.)

16 THE COURT: Will you first poll the jury to see
17 that they are all here.

18 (Roll called; all jurors present.)

19 THE COURT: Miss Leaycraft, you are the one
20 that reports the verdict and the first count that we are
21 going to talk about is Count 1, the conspiracy count.

22 Now, as to the defendant Torres, have you come
23 to a verdict on that first count?

24 THE FORELADY: Yes, we have.

25 THE COURT: What is the verdict?

1 THE FORELADY: Guilty.

2
3 THE COURT: As to the defendant River on the
4 first count, have you come to a verdict on that?

5 THE FORELADY: Yes, we have.

6 THE COURT: What is the verdict?

7 THE FORELADY: Guilty.

8 THE COURT: Now, as to the second count, which
9 concerns only the defendant Torres, have you come to a
10 verdict on that count?

11 THE FORELADY: The second?

12 THE COURT: The second count as to Anthony
13 Torres alone, have you come to a verdict on that?

14 THE FORELADY: Yes.

15 THE COURT: What is your verdict on the second
16 count?

17 THE FORELADY: Guilty.

18 THE COURT: We come to the third count which
19 concerns the defendant Torres.

20 How do you find the defendant Torres as to third
21 count?

22 THE FORELADY: Guilty.

23 THE COURT: Now we come to the last count and
24 that concerns the defendant Rivera.

25 Have you come to a verdict as to the defendant

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Rivera on the fourth count?

THE FORELADY: That is Count 4?

THE COURT: Count 4.

THE FORELADY: Guilty.

THE COURT: Guilty as to Count 4.

I am going to poll the jury, which means that I will ask you individually whether or not this is your verdict and, if it is, you will answer "Yes" and, if it isn't, of course you will answer "No".

Hearken to your verdict as it has been recorded up to this time.

Do you find as to the first count, the conspiracy count, both defendants are guilty?

Do you find that as to the second count the defendant Torres is guilty?

Do you find as to the third count that the defendant Torres is guilty?

And do you find as to the fourth count that the defendant Rivera is guilty?

(Jury polled; all jurors answer in the affirmative.)

THE COURT: All right, the verdict will be entered as it has just been recorded.

I never comment on a jury's verdict because in

26 years that I have been in this kind of an atmosphere I have always felt the same about it. I think I mentioned it once before. That if you do your job according to your conscience, there isn't anybody that can criticize you, but I do have some trouble about trying to get you home.

(Discussion off the record.)

THE COURT: I want to say, by the way, that I received that note and that package and I opened it and thank you for the thought.

It is a small jar which says "Boston Beans" on it, but they are not beans at all. They are jelly beans. I thank you in any event.

All right, you are excused at this time.

(Jury left the courtroom.)

THE COURT: I imagine you want to reserve your motions, do you not?

MR. SCHWARTZ: Yes, your Honor, if that is possible to the day of sentence.

THE COURT: What is a convenient day in the middle of September for sentence?

Pick a date.

MR. SCHWARTZ: Your Honor, is it possible to get a date later on towards the end of the month?

THE COURT: Yes, why not? What date do you want?

How about the 23rd, that is a Monday?

MR. SCHWARTZ: How about the 30th, your Honor. It is a Monday.

MR. DREZIN: The 30th would be very bad for me, your Honor.

THE COURT: On the 2nd I have Congressman Brasco's case so can you take the week before or pick some day before that?

MR. DREZIN: October 1st would be all right.

THE COURT: Is the 1st all right?

MR. SCHWARTZ: That is all right with me, your Honor.

THE COURT: All right, October 1st.

Present bail conditions continued. They are remanded, I believe, in default of bail, are they not?

MR. LITTLEFIELD: Yes, but the Government would ask that they be remanded.

MR. SCHWARTZ: They are remanded.

THE COURT: I will remand them at this time, but if there is any application for bail, I will be glad to hear it at any time if there is such an occasion that arises.

(Whereupon, at 10:30 p.m. the case was concluded.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES of AMERICA

-against-

74 Cr. 472

ANTHONY TORRES,

Defendant.

-----X

ANTHONY TORRES,

Petitioner,

-against-

74 Civ. 5234

(JMC)

UNITED STATES of AMERICA,

Respondent.

-----X

UNITED STATES of AMERICA

-against-

C123-24

C123-25

ANTHONY TORRES,

Defendant.

-----X

MEMORANDUM DECISION

CANNELLA, D.J.:

Anthony Torres is presently before this Court for the imposition of sentence on indictment 74 Cr. 472. Prior thereto, however, the Court must determine whether in imposing sentence on Count Two, on which he was

found guilty of violating former sections 173 and 174 of Title 21, Torres may properly be treated as a second narcotics offender as provided for in former section 7237 of Title 26. The Court finds such second offender sentence appropriate in this case and, therefore, dismisses Torres' civil petition for a writ (74 Civ. 5234).

On August 12, 1974, Torres was found guilty by a jury on counts 1, 2 and 3 of the instant indictment. Thereafter (September 30, 1974) a second narcotics offender information against Torres regarding Count Two was timely filed by the U.S. Attorney in advance of sentence (originally scheduled for October 1, 1974) and in compliance with former § 7237(c)(2) of Title 26. That provision is fully applicable to convictions for violations of former sections 173 and 174 arising from events occurring within the period of their applicability (such as the instant case), notwithstanding the fact that the trial and conviction of the offender was had after the effective date of the new narcotics laws. This result is accomplished by means of the saving provision contained in the new act and has been recognized by the cases. See, e.g., Bradley v. United States, 410 U.S. 605 (1973); United States v. Kella, 490 F.2d 1095 (2 Cir. 1974); United States v. Fiore, 467 F.2d 86, 88 (2 Cir. 1972), cert. denied, 410 U.S. 984 (1973); United States v. Ross, 464

F.2d 376, 378-80 (2 Cir. 1972), cert. denied, 410 U.S. 990 (1973); United States v. Singleton, 460 F.2d 1148, 1155 (2 Cir. 1972); cert. denied, 410 U.S. 984 (1973); United States v. Fiotto, 454 F.2d 252, 254-55 (2 Cir.), cert. denied, 406 U.S. 918 (1972). Compare 21 U.S.C. § 851 (the present statute).

On November 21, 1974, a trial, without a jury, was had by Torres on the question of identity between himself and the person convicted before Judge Rifkind in 1946 -- the predicate conviction alleged in the Government's information. This proceeding was in compliance with section 7237(c)(2) and, after hearing the proof, Torres was found to be one and the same person as had been convicted in 1946. This finding was based upon the testimony of a duly qualified fingerprint expert who found the fingerprints of Torres (Exhibit 1) and the person convicted in 1946 (Exhibit 6) to be those of the same person, an opinion not controverted by Torres, and upon the files and records of this court indicating the source of the 1946 fingerprints.

It was in light of this finding that Torres interposed the present challenge to his 1946 conviction, alleging that his guilty plea was there obtained in violation of Rule 11 as then promulgated and was entered

involuntarily and without an understanding of the charges against him or knowledge of the consequences of the plea -- hence in violation of due process. This civil application is purportedly premised upon 28 U.S.C. § 2255 and Rule 32 of the Criminal Rules, however, those sections can not be availed of for jurisdiction here as the 1946 sentence presently under attack has been completely served by Torres and sentence on the instant offense (74 Cr. 472) has not yet been pronounced by the Court. *Heflin v. United States*, 358 U.S. 415 (1959). Hence, "the motion is not properly within section 2255 [or Rule 32], the sentence having been served, but [the instant application] will be regarded as a petition for a writ in the nature of coram nobis" under the All Writs Act (28 U.S.C. § 1651). *United States v. Capsopa*, 260 F.2d 566,⁵⁶⁷ (2 Cir. 1958). See also, *United States v. Morgan*, 346 U.S. 502 (1954); *United States v. Travers*, ____ F.2d ____, No. 74-1737 (2 Cir. Dec. 16, 1974); *United States v. Forlano*, 249 F.Supp. 174 (S.D.N.Y.), aff'd, 355 F.2d 934 (2 Cir. 1965). Hence, we turn to the merits.

In support of his application, Torres has introduced the minutes of his guilty plea to indictments C123-24 and C123-25 before Judge Rifkind on October 8, 1946. These minutes, which are reflective of the plea

taking procedures of that era, clearly demonstrate non-compliance with Rule 11 as it then existed. Under present law, these minutes alone would compel the Court to set aside the 1946 conviction, as it has been concluded by the Supreme Court in McCarthy v. United States, 394 U.S. 459 (1969), "that prejudice inheres in a failure to comply with Rule 11, for noncompliance deprives the defendant of the Rule's procedural safeguards that are designed to facilitate a more accurate determination of the voluntariness of his plea." Id. at 471-72. See also Irizarry v. United States, ____ F.2d ____, No. 74-1866 (2 Cir. Dec. 19, 1974 as amended on Jan. 23, 1975) However, McCarthy is not retrospectively applicable, Halliday v. United States, 394 U.S. 831 (1969), mere noncompliance with Rule 11 standing alone is not a sufficient ground upon which a pre-McCarthy plea might be vacated. Torres' 1946 conviction can be set aside only upon a finding that his plea was taken in violation of due process in that it was involuntary or that he lacked an understanding of the charge against him and the consequences of the plea. See also, Grant v. United States, 451 F.2d 931 (2 Cir. 1971); cf., United States v. Lester, 247 F.2d 496 (2 Cir. 1957). Noncompliance with Rule 11 is enough, however, to warrant a hearing on the related due process claim.

See, Hall v. United States, 489 F.2d 427, 430 (5 Cir. 1974); United States v. Jasper, 481 F.2d 976, 978 (3 Cir. 1973) ("If the record does not demonstrate literal compliance with Rule 11, a hearing must be held in which the Government bears the burden of proving that the guilty plea was in fact entered voluntarily and understandingly."); Aiken v. United States, 358 F.Supp. 87 (S.D.N.Y. 1972); Banks v. United States, 319 F.Supp. 649 (S.D.N.Y. 1970). This hearing was held before the Court on January 27, 1975.

There exists a dispute between the parties as to who must sustain the burden of proof on the due process issue raised in this case. The Government contends that the usual habeas corpus burden applies -- the petitioner must prove involuntariness and lack of knowledge and understanding by a fair preponderance of the credible evidence. See, United States ex rel. Curtis v. Zelker, 466 F.2d 1092, 1097 (2 Cir. 1972), cert. denied, 410 U.S. 945 (1973). Torres, on the other hand, asserts that because a violation of Rule 11 has been shown, the Government is obligated to prove compliance with due process standards. We adopt the burden of proof advanced by Torres, namely that which requires the Government to prove voluntariness and understanding by a fair preponderance of the credible evidence. This standard was employed

by Judge Mansfield in the Banks case and has been stated by the Seventh Circuit in these terms:

Where, as here, the challenged plea was entered prior to the decision by the Supreme Court of McCarthy v. United States ... and the record is barren of any inquiry by the trial court relating to an essential element of a Rule 11 guilty plea, the government has the burden of demonstrating ... that petitioner's plea of guilty was knowingly and voluntarily made.

Petraborg v. United States, 432 F.2d 1194, 1196-97 (7 Cir. 1970). See also, Hall v. United States, 489 F.2d 427, 430 (5 Cir. 1974); United States v. Jasper, 481 F.2d 976, 978 (3 Cir. 1973); Halliday v. United States, 394 F.2d 149, 150 (1 Cir. 1968), aff'd, 394 U.S. 831 (1969); Rimanich v. United States, 357 F.2d 537, 538 (5 Cir. 1966) (and the cases there cited); cf., Aiken v. United States, 71 Civ. 5328 at n. 2 (S.D.N.Y. Dec. 5, 1973). We find the Government to have met its burden.

At the hearing of January 27th both Torres and his 1946 attorney, Abraham Solomon, Esq., testified and certain documentary proof was introduced into evidence as well. Mr. Solomon, a distinguished practitioner of the criminal law in this court for over fifty years, while presently unable to recall the precise facts and circumstance of Torres' 1946 plea, testified concerning his

invariable practice in all cases.

Any defendant who retained me or was assigned to me would come to the office, and if he was not out on bail I would talk to him in the marshal's office or in the jail at West Street, read the indictment discuss it, explain to him what the government would have to prove before he could be convicted, he would have to have a trial, and advise him of the possible penalties. In many instances they would ask what the judge would do and I would tell them -- definitely I can state under oath every defendant I represented was told what the penalties were particularly in that indictment but not what sentence would be imposed. I have one other peculiarity, I would not permit the defendant to plead guilty unless he told me he was guilty; "Even if you were going to be electrocuted, you can't plead guilty unless you tell me you did it."

(Tr. at 21-22).

We find Mr. Solomon's testimony with regard to his invariable practice to be proper in the context of this case and to strongly advance the Government's burden of proof. In an aptly named case, Yesterday v. United States, 442 F.2d 1020 (9 Cir. 1971), the Ninth Circuit (which adopts the burden of proof employed herein) affirmed the district court's denial of \$ 2255 relief to a prisoner who had challenged his 1936 murder conviction. The court stated (id. at 1020-21):

The records of petitioner's arraignment and sentencing are silent as to what if anything he may have been told about the nature of the charge of second-degree murder

or the consequences of a plea of guilty to that charge.

Mr. Scruggs, the chief deputy clerk, testified that he had no present recollection of petitioner's arraignment and sentencing. He testified further, however, that it was the invariable practice of the sentencing judge to explain both the charge and the possible penalty to the defendant before receiving a guilty plea to a charge of this seriousness.

Relying upon the presumption of regularity and the testimony of Mr. Scruggs, and expressly rejecting petitioner's testimony as unreliable, the district court found that petitioner entered his plea freely, voluntarily, and with the requisite knowledge.

Petitioner argues that when the record is silent, as here, the burden rests upon the government to establish that a guilty plea was properly taken, and that the government failed to carry its burden. Assuming that the burden of persuasion is to be allocated as petitioner suggests, the evidence was sufficient to sustain the district court's finding.

In a subsequent decision, Tibbs v. United States, 459 F.2d 292 (9 Cir. 1972), that court reached a similar conclusion. In Tibbs, the petitioner, who had waived an attorney and entered a plea of guilty, challenged his 1961 conviction on voluntariness grounds. At an evidentiary hearing in the district court,

[t]he Assistant U. S. Attorney who handled the case at the time of the pleas and sentences, testified he had no recollection of the petitioner but identified his writing on the file, showing he had handled the case. He testified

as to his customary practice in handling criminal cases; to fully explain the Rule 20 procedures; to advise the defendant of the charges against him, the potential maximum penalties and of the various sentencing possibilities available to the sentencing judge.

Id. at 293. The district court, relying in part on such testimony, denied § 2255 relief and the Court of Appeals affirmed. The appellate court stated:

Where a great lapse of time occurs before a 2255 hearing a court may rely on testimony as to the customary practices in the court and the presumption of regularity. *Yesterday v. United States* (9 Cir. 1971) 442 F.2d 1020.

Id. at 293. And it concluded that:

In view of the testimony of the Assistant U.S. Attorney that he always advised defendants of the maximum penalty on a charge; that he never promised any defendant, including Tibbs, that a judge would impose concurrent sentences; and the presumption of regularity, the trial court's findings are supported by the evidence. *Yesterday v. United States*, supra.

Id. at 294. A different result is not required in the instant case. We have no reason to doubt that Mr. Solomon adhered to his usual practice in Torres' case and we conclude, based upon the other evidence before the court, that he, in fact, did so despite Torres' contrary assertion. To the extent that Judge Mishler's oral decision in United States v. Christian, 72 Cr.

1139 (E.D.N.Y. Dec. 7, 1973) is inconsistent with this view, we decline to follow it,

Our view is bolstered by certain events which transpired at the October 23, 1946 sentencing hearing before Judge Rifkind. At that time, the Assistant U.S. Attorney recommended a three year concurrent term for Torres on each count and a \$500 fine. He did so after first reviewing the factual allegations in the case in open court (Torres being present). The Assistant made a similar recommendation with respect to the co-defendant Peloso. While Torres was by and large silent in the face of this recommendation, Peloso was not. For pages in the record Peloso wavered between being sentenced and withdrawing his guilty plea. This culminated when Judge Rifkind stated:

I want you to know this, Anthony Peloso: This is straight, undiluted. I am not trying to deceive you. Every time I put down a year and a day, or six months, or three years next to the name of a defendant, that gives me a wrench. I don't like to take a man's liberty away and when I take it away for a year, I am taking that much of his life away; and I have a conscience. I won't do it for a man who is not guilty. If you tell me you do not think you are guilty, I won't sentence you. Unless you tell me you are guilty, or unless a jury of 12 men tells me you are guilty, under no circumstances will I impose a sentence on you. So, although your time to withdraw your plea has long expired, you have no right to withdraw your plea now, but I am granting it to you, we are going to have no foolishness. If you are innocent, all right; if you are not guilty, you will stand trial.

(Oct. 23, 1946 Tr. at 9-10). Torres was present in court throughout this exchange and he thereafter retired from the courtroom along with Peloso and Mr. Solomon to discuss the matter.

Although Judge Rifkind's remarks, supra, were directed specifically to Peloso, no one present in the courtroom on October 23, 1946 could have missed their thrust -- that the Judge would not accept the plea of one who did not believe himself guilty. Torres' presence during these events and his silence in the face of them stands, in our view, as further circumstantial proof against his present claim. Compare, Banks v. United States, 319 F.Supp. at 651-52.

Torres also testified at the January 27th hearing. He responded to the questions put to him in the following fashion.

Q Did Mr. Peloso prior to your entering a plea of guilty tell you that you should plead guilty to the charges and take the weight?

A Yes. Not in those same words, but he did say that.

THE COURT: What is the best recollection you have of what he did say?

A "You cop out, your young, take the weight, and you will get a light -- they will go easy on you," or something to that effect.

Q Did you ever have any discussion with your lawyer about the facts of your case?

A No.

....

Q Did you know at the time you appeared in court for sentence on October 23, 1946 how much time you were actually facing as a result of your guilty plea?

A No, sir.

Q Did you ever discuss that with your lawyer?

A Never told me nothing about the time, or anything like that.

....

THE COURT: You are saying also that he didn't tell you it was a narcotics case that you were charged with.

THE WITNESS: Well, I knew it was narcotics, yes, but --

THE COURT: You did know that.

THE WITNESS: That it was narcotics, sure.

CROSS EXAMINATION BY MR. LITTLEFIELD:

Q So what is your testimony with respect to what you didn't know about --

A I didn't know what time I was facing, I didn't know what the consequences were, I didn't know anything about it. I was 23 years old and I had never been in trouble before. [Emphasis added.]

Q You say you didn't know the time you were facing and you say you didn't know the consequences.

What other consequences aside from what time you were facing is it that you didn't know?

....

THE WITNESS: Well, I didn't know what the time or parole or probation was or anything like that.

Q Anything else?

A Other than that --

Q Is there anything else you didn't know about the charges to which you pled guilty other than the sentence?

A I didn't know anything at that time. I was very young.

Q Did you ever see a copy of the indictment?

A No.

....

Q Were you present in court when an indictment was handed over?

A Handed over to whom?

Q I am asking you if you were present --

A I didn't even know what an indictment was at the time.

Q So you didn't see the charge against you.

A No.

(Tr. at 33-36.)

Q Do you recall the moment when you were sentenced?

A Yes, I do.

Q Is it your testimony that at the moment you were sentenced you didn't know that you could get a three year sentence?

A At the moment I was sentenced I didn't know --

Q That you could get a three year sentence.

A I didn't know anything at that time, sir. I was very ignorant of the law, 23.

Q I just want to make sure: Was there any other consequence of your guilty plea that you did not know about other than the fact that you could get what time you could get?

A Other than that, no.

Q If you had known that you could get the sentence you ended up getting, three years, would you have pled guilty or not?

MR. SCHWARTZ: I object to that.

A I don't know what I could have --

THE COURT: Overruled.

A I would have had to taken a lawyer's advice.

Q You don't know what you would have done?

A No.

(Tr. at 43-44).

The Court finds Torres' testimony to be inherently incredible, not worthy of belief and an absolute fabrication which seizes upon a void in the 1946 record (a void common to all guilty pleas of that era) and seeks to embellish it to suit his present purposes. Torres simply was not the "babe in the woods" he now claims he was in 1946. He had previously

been convicted of a felony in the state courts and had served a jail sentence. (See, Tr. at 49-50). He surely was "street smart" beyond his "tender" years. At the January 27th hearing, Torres demonstrated a "selective" memory -- "remembering" that which he desired to remember and "forgetting" that which was adverse to his claim. In short, Torres is a liar (see, United States v. Tramunti, 377 F.Supp. 1, 1-2 (S.D.N.Y. 1974) (Duffy, D.J.)) and the Court disregards his testimony entirely (except to the extent that its negative qualities enhance the Government's proof).

The voluntary nature, the understanding and knowing qualities which must be associated with a guilty plea in order for it to comport with the standards of due process may be proved by the existence of "circumstances from which it is evident that the defendant [had] the requisite understanding." United States v. Davis, 212 F.2d 264, 267 (7 Cir. 1954). See also, Kelly v. United States, 299 F.Supp. 1367, 1370 (S.D.N.Y. 1969). The circumstantial proof in this case satisfies the Court that Torres was not deprived of due process in 1946. Absent the production by Torres of "substantial objective proof" (United States ex rel. Curtis v. Zelker, 466 F.2d at 1098) to overcome the Government's otherwise persuasive evidence, we find the burden of proof to have been met in this case. Our conclusions

are similar to those of Judge Caffrey in the Halliday case, 274 F.Supp. 737, 738-39 (D.Mass. 1967), aff'd, 394 F.2d 149 (1 Cir. 1968), aff'd 394 U.S. 831 (1969) and the Ninth Circuit cases discussed above. See, p.p. 8 - 10, supra.

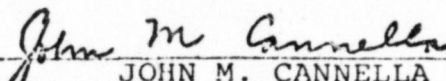
As Chief Justice Warren stated for the Court in McCarthy, 394 U.S. at 466:

A defendant who enters [a guilty] plea simultaneously waives several constitutional rights, including his privilege against self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts. (footnotes omitted).

Here, applying the criteria acknowledged in Halliday, we conclude that despite the court's noncompliance with Rule 11 in the 1946 plea proceedings, Torres was not deprived of due process and we further find that the Government has proved by a fair preponderance of the credible evidence that Torres acted voluntarily, with knowledge of the charges against him and an understanding of the consequences when he entered the guilty pleas before Judge Rifkind.

According, Torres' civil petition for a writ of error coram nobis (74 Civ. 5234) is hereby dismissed and the Court will proceed to sentence on indictment 74 Cr. 472.

It is SO ORDERED.



JOHN M. CANNELLA
United States District Court

Dated: New York, N.Y.
February 6, 1975.

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 12 day of April, 1975 deponent served the within *appellate* upon *M.S. Attorney*

attorney(s) for

appellee

in this action, at

*M.S. Courthouse
Foley Sq.
New York, N.Y.*

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

[Signature]
ROBERT BAILEY

Sworn to before me, this

16 day of *April*, 1975

William Bailey

WILLIAM BAILEY

Notary Public, State of New York

No. 43-0132945

Qualified in Richmond County

Commission Expires March 30, 1976